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PREFACE

The ***Military Law Review*** is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

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MILITARY LAW REVIEW — VOL. 41

JUDICIAL FUNCTIONS FOR THE COMMANDER?*

By Major Donald W. Hansen**

This article examines in depth the historic relationship between the commander and the military justice system. The author considers the relation that the commander's exercise of judicial functions bears to his responsibility for maintaining good order and discipline in the command, and whether this current relationship is so tenuous as to justify removing him entirely from the arena of military justice. He concludes that the commander must play an indispensable role in any system of military justice.

I. INTRODUCTION

> [S]tanding armies in time of peace, are inconsistent with the principles of republican Governments, dangerous to the liberties of a free people, and generally converted into destructive engines for establishing despotism.[1]

Despite the fears of the Rebublic's founding fathers,[2] the growth of the American Nation has been attended by a similar growth in the size of its standing army.[3] International tensions, which have characterized the post World War II era, indicate that a large military establishment will characterize American society for the foreseeable future with far reaching consequences to the citizenry in general and to members of the legal profession in particular.[4]

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*This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Fourteenth Career Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] **27 JOURNALS OF CONTINENTAL CONGRESS 518 (1784)** (G.P.O. ed. **1928).**

[2] THE FEDERALIST No. **8,** at **45** (Britannica ed. **1952)** (Hamilton).

[3] In **1784,** the American Army consisting **of** 700 men was ordered discharged by the Continental Congress: ***"Resolved,*** That the commanding officer be, and he is hereby directed to discharge the troops now in the service of the United States, except **25** privates, to guard the stores at Fort Pitt, and **55** to guard the stores at West Point and other magazines, with a proportionate number of officers; no officer to remain in service above the rank of a captain." **27 JOURNALS OF CONTINENTAL CONGRESS 524 (1784)** (G.P.O. ed. **1928).** As of December **31, 1964,** the strength of the U.S. Army on active duty consisted of **971,384** officers and men. WORLD ALMANAC **724 (1965).**

[4] "'[M]ilitary justice is the largest single system of criminal justice in the nation, not only in time of war, but also in time of peace; now, and as far ahead as we can see." Karlan & Pepper, ***The Scope*** of *Military* ***Justice,*** **43** J. CRIM. L.C. & P.S. **285, 298 (1952).**

As the size of the armed forces increased during our historical development, the traditional view of the court-martial as a "court of honor"[5] came under close scrutiny by the citizen-soldiers who had not voluntarily assumed its burdens. As a result, the courts-martial system ceased to be the exclusive province of the professional soldier and became of vital interest to the public-at-large. This "democratization of war"[6] was to have a profound effect on the military justice system when the citizen armies which had been called forth to defend the nation during periods of crisis were demobilized in times of peace. The isolated instances of summary discipline they had experienced caused a demand for reform of the entire system.

The central issue in the proposed reforms involved the interrelationship of the commander and the courts-martial system in the fabric of military discipline: To what extent should the court-martial be an instrument of command discipline? To what extent should the court-martial be an independent judicial tribunal?[7] During the hearings before the House Armed Services Subcommittee on the *Uniform Code of Military Justice,*[8] Professor Edmund M. Morgan, the president of the drafting committee, indicated that a compromise had been reached between these conflicting interests:

> We were convinced that a Code of Military Justice cannot ignore the military circumstances under which it must operate but we were equally determined that it must be designated [sic] to administer justice.
>
> We, therefore, aimed at providing functions for command and appropriate procedures for the administration of justice. We have done our best to strike a fair balance, and believe that we have given appropriate recognition of each factor.[9]

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[5] W. WINTHROP, MILITARY LAW AND PRECEDENTS 54 (2d ed. rev. & enl. 1920) [hereafter cited as WINTHROP]. "[I]t should also be borne in mind that they are in a special sense courts of honor, whose object is the maintenance of a high standard of discipline and honor in the Army, and which, in the exercise of this jurisdiction, try many accusations based upon acts entirely unknown to the civil courts as criminal offenses. Only courts composed of military officers can have that knowledge of the standard of discipline and honor in the Army which would enable them to weigh correctly acts impairing it, and courts-martial, in maintaining this standard, may properly be said to be courts of honor." G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 16 (3d ed. rev. 1913) [hereafter cited as DAVIS].

[6] *See generally* W. MILLIS, ARMS AND MEN 13-72 (1956).

[7] *See generally* S. REP. No 486, 81st Cong., 1st Sess. (1949).

[8] 10 U.S.C. §§ 801-940 1964 [hereafter called the Code and cited as UCMJ].

[9] *Hearings on H.R.2498 Before a Subcommittee of the House Committee on Armed Forces,* 81st Cong., 1st Sess. 606 (1949) [hereafter cited as 1949 *Hearings].*

[10] "United States v. Boysen, 11 U.S.C.M.A. 331, 341, 29 C.M.R. 147, 167 (1960) (dissenting opinion).

This background led Judge Latimer of the United States Court of Military Appeals to observe:

> It is generally well known and understood that the powers of a Federal judge in the civilian community are divided in the military .... They are allocated by military law to the court-martial, the convening authority, and the law officer.[10]

Indeed, the Court has recently indicated that all military justice activity by the commander will be tested by standards applicable to judicial officers.[11] The conclusion that the commander exercises judicial functions in dealing with breaches of discipline involves a significant departure from the traditional view expressed by Winthrop that courts-martial are nothing more than ***"instrumentalities of the executive power."***[12]

Since this article will examine the development of the commander as a judicial officer, and an evaluation of the continued necessity for him to perform judicial acts in connection with military justice, a working definition of the term "judicial function" is necessary.

II. THE NATURE OF THE JUDICIAL FUNCTION

In an effort to develop the court-martial as an independent court of law, the Court of Military Appeals has been confronted with the extensive authority granted the commander under the Code. Rather than accept as basic the command nature of the court-martial, the Court has utilized the term "judicial function" as the conceptual vehicle to explain the commander's authority to lawfully participate in the field of military justice represented by the court-martial.[13] Although the commander's "judicial func-

"In United States v. Ellsey, **16** U.S.C.M.A. **455, 37** C.M.R. **75 (1966),** the Court held a ruling by the convening authority refusing to permit the trial counsel to amend a specification was judicial in nature and binding on that officer The Court noted: "The convening authority's function in military justice is judicial in nature. His actions are magisterial, and this is so whether he grants pretrial relief to a party to the proceedings or, as in this case, denies it." *Id.* at **457, 37** C.M.R. at **77.**

[12] WINTHROP **49** (emphasis in original).

[13] The tendency of the Court to separate the functions of the commander was decried by Judge Latimer: "In short, in that field which may involve executive, judicial, and legislative functions, we have a systematic, unbroken executive practice, pursued for over the entire life of this country with the knowledge and blessing of Congress, and never up to this date legally questioned by that body. Why, then, should we be so hypertechnical about departmentalizing his functions to deny him powers which have been continuously recognized?" United States v. Simpson, **10** U.S.C.M.A. **229, 238, 27** C.M.R. **303, 312 (1959)** (dissenting in part).

tions" were not defined as such by Congress, the term has a genesis in the Code:

> No person subject to this [Code] may attempt to coerce **or,** by any unauthorized means, influence the action **of** any convening, approving, or reviewing authority with respect to his ***judicial acts.***[14]

BY defining the commander's power as "judicial," the Court gives meaning and substance to a standard against which his actions under the Code will be judged.

Judicial functions may be defined generally as "[t]he capacity to act in the specific way which appertains to the judicial power, as one of the powers of government."[15] Viewed in this light, the proceeding must itself be judicial in the sense that it involves a personal[16] adjudication between contesting parties. The essence of the judicial power is the exercise of independent discretion[17] unfettered by directives of higher authorities.[18] In this regard, judicial functions must be distinguished from administrative functions[19] which require set tasks prescribed by law defining the time, method, and occasion of its performance and in no way involving the application of the judgment factor.

Occasionally, the Court of Military Appeals has found a judicial function where the convening authority exercises powers corresponding to those normally held by some judicial agency in the civilian community. For example, the Court has noted that the act of the convening authority in referring cases to trial is similar to a grand jury indictment.[20] Likewise, he acts judicially in

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[14] UCMJ art. **37** (emphasis added).

[15] **BLACK'S LAW** DICTIONARY **985** (4th ed. **1957).** "Implicit in this process [trial by court-martial] is the fact that the convening authority occupies a judicial position and his actions in that capacity amount to an exercise of the sovereign judicial power of the United States." United States v. Smith, **16** U.S.C.M.A. **274, 276, 36** C.M.R. **430, 432 (1966).**

[16] In Runkle v. United States, **122** US. **543** (1887), the Supreme Court was confronted by a cashiered officer who contended that his dismissal was unlawful since the Secretary of Army had taken final action in the case rather than the President as required by statute. The court held that the statute required the President to personally exercise his judgement and the power to make the decision could not be delegated.

"There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. . . .

"Here, however, the action required of the President is judicial in its character, not administrative." *Id.* at **557.**

[17] See United States v. Prince, **16** U.S.C.M.A. **314, 36** C.M.R. **470** (1966).

[18] *See* United States v. Doherty, **5** U.S.C.M.A. **287, 17** C.M.R. **287** (1954).

[19] *See* United States v Johnson, **10** U.S.C.M.A. **630,** C.M.R. **196** (1959), where the Court held that receipt of charges by the summary court-martial authority was an administrative act which could be delegated since it did not involve the exercise of discretion.

[20] "'United States v. Roberts, 7 U.S.C.M.A. **322, 22** C.M.R. **112 (1956).**

directing the subpoena of witnesses much as the federal judge may do for an indigent defendant[21] or when he authorizes a search in the manner of a federal magistrate.[22]

Whether a particular power will be considered as judicial may depend upon the purpose for which it was exercised. In general, judicial functions are primarily concerned with some aspect of adjudicating the guilt, quantum of punishment, or other issue relating to the trial of a specific individual in a particular case.[23] This feature of the judicial function was involved in the case of *United States v. Simpson*[24] where the Court of Military Appeals considered the validity of the Manual provision[25] that an accused was automatically reduced to the lowest enlisted grade when the approved sentence included a punitive discharge or confinement at hard labor. In his action, the convening authority, pursuant to the Manual provision, approved a bad conduct discharge and reduced the accused to the lowest enlisted grade. The accused contended that the action of the convening authority resulted in an illegal increase in his punishment since the court-martial did not include a reduction in the adjudged sentence. The Government countered by contending that the President's power to authorize the reduction was administrative in nature and outside the judicial operation of the courts-martial system. The Court held that the Manual provision was invalid and the action of the convening authority in reducing the accused was set aside. The Court pointed out its concern with judicial acts in the course of courts-martial proceedings, and concluded that sentencing of individuals is not one of the functions entrusted to the commander:

> The provision is so interwoven with the courts-martial process that it cannot be regarded as anything but judicial in purpose and effect. As a judicial act, it operates improperly to increase the severity of the sentence of the court-martial.[26]

[21] United States v. Thornton, 8 U.S.C.M.A. 446, 24 C.M.R. 256 (1957).

[22] United States v Hartsook, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

[23] For example, it is improper to exercise command influence over courts-martial by withdrawing the charges merely because the prosecution has not adequately proved its case and the trial might result in an acquittal. ACM 8951, Flegel, 17 C.M.R. 710 (1954). But if the reason for withdrawing the charges was unrelated to the trial of the accused and solely due to military necessity, the accused may later be tried on the same charges. Wade v. Hunter, 336 U.S. 684 (1949). See dissenting opinion of Judge Quinn in United States v. Stringer, 5 U.S.C.M.A. 122, 139-40, 17 C.M.R. 122, 139-40 (1954).

[24] 10 U.S.C.M.A. 229, 27 C.M.R. 303 (1959).

[25] *Manual for Courts-Martial, United States, 1951,* ¶ 126*e* [hereafter called the Manual and cited as MCM].

[26] "United States v. Simpson, 10 U.S.C.M.A. 229, 232, 27 C.M.R. 303, 306 (1959). *See also* United States v. Powell, 12 U.S.C.M.A. 288, 30 C.M.R. 288 (1961).

Therefore, judicial functions will be considered as those powers a commander has that are normally exercised by a civilian judicial officer involving discretionary findings of fact and law bearing upon the contest between the accused and the State. Without this restrictive definition, the term would be little more than a shorthand expression of Winthrop's view of the executive nature of the commander's powers in the military justice field.

III. THE EXECUTIVE INSTRUMENTALITY CONCEPT

A. *THE THEORY AND ITS VALIDTY*

The controversy concerning the commander's exercise of judicial functions may be traced to Winthrop's early observations of the commander's relationship to the court-martial:

> Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply ***instrumentalities of the executive power,*** provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.
>
> Thus indeed, strictly, a court-martial is not a ***court*** in the full sense of the term, or as the same is understood in the civil phraseology. It has no common law powers whatever, but only such powers as are vested in it by express statute, or may be derived from military usage.[27]

Winthrop based his conclusion, in part, upon the language of the Supreme Court in Dynes *v.* ***Hoover:***[28]

> These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States, indeed that the two powers are entirely independent of each other.[29]

In addition, Winthrop noted that the constitutional provisions pertaining to the power "To make Rules for the Government and

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See also United States v. Powell, 12 U.S.C.M.A. 288, 30 C.M.R. 288 (1961).

[27] **WINTHROP 49** (emphasis in original) (footnote omitted).

[28] 61 **U.S.** (20 How.) 65 (1850).

[29] Id. at 78.

Regulations of the land and naval forces"[30] are found in the legislative rather than in the judicial articles.[31]

Winthrop's ipterpretation of the Supreme Court's view in ***Dynes v. Hoover*** has been criticized[32] as failing to recognize that it is unnecessary for a court to be organized under article III of the Constitution in order to perform independent judicial functions. This view of the nature of courts-martial attached special significance to the language of the Supreme Court in ***Runkle v. United States.***[33]

> A court martial organized under the laws of the United States is a court of special and limited jurisdiction.[34]

Therefore. the Court concluded:

> The whole proceeding from its inception is judicial. The trial, findings, and sentence, are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law.[35]

The conclusion that courts-martial are not instruments of discipline ignores the historic foundation of American military law. Although the present is not irrevocably wedded to the past, the theory of the commander's relationship to the court-martial apparently was clearly understood in the beginning. Our earliest codes were an adoption of the British Articles of War existing at the time of the Revolution.[36] The King's power over his armed forces was based primarily on his position as chief executive and commander-in-chief of the armies.[37] As such his power was independent of any statutory authority.[38]

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[30] U.S. CONST. art. I, § 8.

"It is interesting to note that the Code proposals were sent to the armed services committees rather than the judiciary committees. In the Senate, a proposal by the chairman of the Judiciary Committee to refer the bill to his committee was defeated. **96** CONG. REC. **1417 (1950).**

[32] ***E.g.***, J. SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE **43-48 (1953).**

[33] **122** U.S. **543 (1887).**

[34] "Id. at **555.**

[35] ***Id.*** at **558.**

[36] John Adams, a member of the committee to revise the military code of **1775** commented: "There was extant one system of articles of war, which had carried two empires to the head of mankind, the Roman and the British; for the British articles of war were only a literal translation of the Roman. . . .I was, therefore, for reporting the British articles of war ***totidem verbis.*** . . .The British articles of war were, accordingly, reported. . .and caried." **3** J. ADAMS, WORKS **OF** JOHN ADAMS **68 (1851).**

[37] **1** W. BLACKSTONE, COMMENTARIES **262** (Christian ed. **1818).**

[38] Winthrop views the development of British military law as a general statutory recognition of the royal prerogative. See WINTHROP **18-21.**

> At the time of our separation, the King was not only the commander of the Army, he was the legislator of the Army; he prescribed the Articles of War, the offenses and the penalty; he prescribed both the substantive and procedural law; he prescribed the courts-martial, their jurisdiction and their procedure. He controlled the entire system of discipline and the methods of its administration. The Army was his, the officers were his officers and from him drew their authority. Courts-martial were courts-martial of the King and of the officersrepresenting him and his power of command. The courts-martial, therefore, applied his law, his penalties, followed his procedure and were subject to his command. Under such a scheme, a court-martial was but an agency of command, nowhere in touch with the popular will, nowhere governed by laws established by the people to regulate the relation between sovereign and subject. It was not a judicial body. Its functions were not judicial functiops. It was but an agency of the power of military command to do its bidding.[39]

Whenever it became necessary to raise an army, the King issued ad hoc articles of war for the government of his forces during the emergency.[40]

The colonial forces had served with royal troops during the French-Indian War and during the years immediately preceding the Revolution, and were familiar with the administration of military justice under the British Articles of War of 1774. The drafters of the Constitution and the members of the Continental Congress must have recognized that the court-martial contemplated by the articles of war they were adopting established agencies in the executive department for the enforcement of discipline.[41]

Implied in Winthrop's position is the theory that the executive has constitutional power over military courts which is independent of congressional authorization. It is significant to note that the provision of the Articles of Confederation granting the legislative branch the "sole and exclusive" power to provide rules for the government of the armed forces was omitted from article I, § 8, of the Constitution.42 This indicates that the executive powers are

[39] Ansell, *Military Justice,* 5 CORNELL L.Q. 1, 6 (1919).

[40] *E.g.*, Articles of War of James II (1688) (reprinted in WINTHROP 920); Articles of War of Richard II (1385) (reprinted in WINTHROP 904) ; Ordinance of Richard I (1190) (reprinted in WINTHROP 903).

[41] "They [speaking of the British Articles] laid the foundation of a discipline which, in time, brought our troops to a capacity of contending with British veterans and a rivalry with the best troops of France." 3 J. ADAMS, WORKS OF JOHN ADAMS 69 (1851).

[42] ***Compare*** article IX, United States. Articles of Confederation : "The United States in Congress assembled shall also have the ***sole and exclusive*** right and power. . .of making rules for the government and regulation of the said land and naval forces, and directing their operations." (emphasis added), *with* article I, § 8, United States Constitution: "The Congress shall have power. . .to make Rules for the Government and Regulation of the land and naval forces. . . ."

not entirely preempted by Congress.[43] Indeed, the Supreme Court has recognized that the executive has the power to constitute general courts-martial for disciplinary purposes without specific authorization of Congress.[44]

Yet, it is readily apparent that the commander under the Code does not exercise all the powers formerly enjoyed by the King. Does this mean that the court-martial is no longer an instrument of discipline? The key to this question involves an overlooked portion of Winthrop's analysis. While asserting that courts-martial are subject to the will of the commander, he acknowledged that they will also function as judicial tribunals "in so far as an independent discretion may be given it by statute."[45] In the absence of such a statute the courts-martial process continues to be an instrument of command discipline.[46] When viewed in this context, Runkle *v.* United *States*[47] can be reconciled with Winthrop's views since the case illustrates a legislative directive that the President exercise his personal judgment in a judicial capacity when approving sentences of dismissal.

Following this analysis, the position of the commander as a judicial officer can be understood as the result of two converging developments. One involved the gradual accretion by the commander of judicial powers in his capacity as a convening authority. The other saw the enhancement of the court-martial as an independent judicial body with corresponding limitations placed upon the commander in the exercise of his disciplinary powers. The remainder of this chapter will investigate the increasing involvement of the commander in the courts-martial process and the safeguards inserted therein as Congress labored to insure that the commander did not exceed his alotted role.

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[43] ***See generally*** Fratcher, ***Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals,*** 34 N.Y. U.L. REV. 861 (1959). The author concludes that the constitutional provisions were designed to produce the English system whereby the King had plenary powers over the armed forces except to the extent his power was restricted by statute.

[44] Swaim v. United States, 165 U.S. 553 (1887) (alternate holding),

[45] WINTHROP 49.

[46] Professor Edmund M. Morgan, who was to play an important role forty years later in developing the Code, in commenting on the Articles of War of 1916, said: "It therefore seems too clear for argument that the principle at the foundation of the existing system is the supremacy of military command. To maintain that principle, military command dominates and controls the proceeding from its initiation to the final execution of the sentence. . . .In truth and in fact, under the system as administered by the War Department, courts-martial are exactly what Colonel Winthrop has asserted them to be. . . ." Morgan, ***The Existing Court-Martial System and the Ansell Army Articles,*** 29 YALE L.J. 52, 66 (1919).

[47] 122 **U.S.** 543 (1887).

B. *STATUTORY DEVELOPMENT*[48] *OF THE COMMANDER AS A JUDICIAL OFFICER*

1. *The Early Articles of War.*

On the day the Continental Congress raised an army to march to the relief of Boston, a committee including George Washington was appointed "[to prepare] Rules and regulations for the government of the army."[49] On June 30, 1775, the Articles of War of 1775,[50] combining portions of the British code and the Massachusetts Articles, prefaced by a declaration of the necessity for raising an army, became the first national code of military justice. However, the Continental Congress, deeply involved with the business of revolution, apparently failed to give sufficient attention to its initial labors and the articles were revised the following year.[51]

Illustrative of the Continental Congress' acceptance of the system of military law then prevailing in the British army was the failure to recognize that the British articles made no provision for the power to convene general courts-martial.52 Accordingly, there was no statutory power for the commander to do so in the American articles. But even without statutory recognition, it was apparently conceded that the commanding general of the Continental forces had inherent authority of some nature to convene a court-martial where the interests of discipline required.[53]

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[48] In many cases statutory provisions were preceded by customary practice or general orders restricting the commander's power. However, since these restrictions were not beyond the commander's power to change, they will not be considered.

[49] 2 JOURNALS OF CONTINENTAL CONGRESS 90 (1775) (G.P.O. ed. 1905). Shortly thereafter Washington was appointed commanding general of the continental forces and took no part in the deliberations. *Id.* at 91.

[50] *Id.* at 111 (reprinted in WINTHROP 953).

[51] 5 JOURNALS OF CONTINENTAL CONGRESS 788 (1776) (G.P.O. ed. 1906) (reprinted in WINTHROP 961) [hereafter cited as AW 1776 sec. —, art. —].

[52] Prior to 1689, commanders were authorized by special commission from the King to make rules for the enforcement of discipline without regard to legislative authority. With the Mutiny Act of 1689, 1 W. & M., c. 5, Parliament gave statutory recognition to the royal prerogative; however, the provisions were not included in the Articles of War of 1774 utilized by the committee to prepare the Articles of 1776.

[53] In 1778, General Washington was forced to set aside a conviction and judged by a court convened by General Gates since the latter had no power to appoint a general court-martial. With regard to his own power, General Washington noted: "It is a defect in our own martial law, from which we often find great inconvenience, that the power of appointing a general courts-martial is too limited. I do not find it can be legally exercised by any officer, except the Commander-in-chief, or the commanding general in any particular State." Letter from General Washington to General Gates, Feb. 14, 1778 (reprinted in 5 J. SPARKS, THE WRITINGS OF GEORGE WASHINGTON 236 (1834).

In contrast to this seemingly blind acceptance of the British system, the Continental Congress specifically retained, concurrently with the Continental commander, the power to review all cases as an appellate authority.[54] By 1786[55] Congress relinquished final approving authority to the Continental commander in all cases except for those involving death, dismissal of a commissioned officer in peacetime, and all sentences involving general officers.[56]

Even though the military court was substantially an extension of the commander's will, the decision making process of adjudicating the guilt or innocence of the accused began to take on some aspects of an independent agency. The oath required the court to "duly administer justice according to the rules and articles."[57] This judicial flavor was further enhanced by the presence of no less a person than "[t]he judge-advocate general, or some person deputed by him"[58] to prosecute the case in the name of the United States. The Articles of War of 1776 made no provision for the accused to receive any assistance in meeting the charge that his conduct posed a threat to the discipline of the army; however, the amendments of 1786 required that:

> The judge advocate, or some person deputed by him shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question, to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate [sic]himself [59]

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[54] AW 1776 sec. XIV, art. 8.

[55] Resolution of May 31, 1786, 30 JOURNALS OF CONTINENTAL CONGRESS 316 (1786) (G.P.O. ed. 1934) (reprinted in WINTHROP 972) [hereafter cited as AW 1786 art. —].

[56] *Compare* The Prince Rupert's Articles, art. 60 (1672) [reprinted in DAVIS 567] : "[W]hen sentence is to be given, the President shall pronounce it; and after that the sentence is pronounced, the Provost-marshal1 shall have warrant to cause execution to be done according the sentence."

[57] AW 1776 sec. XIV, art. 3:

"You shall well and tryly try and determine, according to your evidence, the matter now before you, between you, between the United States of America, and the prisoners to be tried. So help you God.

"You. . . .do swear, that you will duly administer justice according to the rules and articles for the better government of the forces of the United States of America, without partiality, favor, of affection; and if any doubt shall arise, which is not explained by said articles, according to your conscience, the best of your understanding and the custom of war in the like cases. And you do further swear, that you will not divulge the sentence of the court, until it shall be approved of by the general, or commander in chief; neither will you, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness by a court of justice, in a due course of law. So help you God."

[58] AW 1776 sec. XIV, art. 3.

[59] AW 1786 art. 6.

In summary, the British provisions remained substantially intact in the new American articles although peculiarly American influences appeared to be at work delineating the power of the commander.

2. *The Articles of War of 1806.*[60]

The American adaptation of the British articles of war continued into the constitutional period. The separation of powers into executive, judicial, and legislative branches had its effect on the command nature of the courts-martial. The executive functions that had been performed by the Congress under the Articles of Confederation were transferred to the newly created executive branch. As a result there was a feeling in Congress that times had materially changed, and some revision was necessary to adopt the articles of war to the constitutional framework.[61]

In meeting the new governmental structure of the Constitution, a significant concession to the executive department as the primary agency to assure a proper review of court-martial cases was made. The judicial review function which Congress had heretofore been exercising in conjunction with the commander was transferred to the President.[62] Thus, the review of courts-martial procedure was centralized in the command structure.

In addition, the articles represented a major step forward in the involvement of commanders in the military discipline system. Protection of the frontiers of the new nation rendered it necessary to expand the class of those authorized to invoke the disciplinary powers of the general courts-martial. Any general officer commanding an army and colonels in charge of separate departments were endowed with the power to convene a general court-martial.[63] As a result, the court-martial was potentially subject to the pressures of discipline asserted by the local commander. Additionally, it was no longer necessary that The Judge Advocate General or his personal designee prosecute the case: Since any commander who could convene the court was also authorized to appoint the trial judge advocate, the legal advisor came under the direct control of the commander.[64]

Although the statute created many new general court-martial appointing authorities, the freedom of the individual commander

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[60] Act or Apr. 10, 1806, ch. 20, 2 Stat. 359 (reprinted in WINTHROP 976).

[61] 15 ANNALS OF CONG. 263 (1805).

[62] AW 1806 art. 65. The Act of Dec. 24, 1861, ch. III, 12 Stat. 330, further extended confirmation power to division and separate brigade commanders during time of war.

[63] AW 1806 art. 65.

[64] AW 1806 art. 69.

to exercise his influence during the course of the trial was limited in two minor, though important, areas. In order to assure some degree of impartiality the accused was granted the statutory right to challenge court members for cause.[65] In 1830, the commander was prohibited from appointing the court in those cases where he was the "accusor or prosecutor."[66] However, this restriction was limited to the trial of officers and had no application to inferior tribunals.

3. *The Articles of War of 1874.*[67]

The Articles of War of 1806 were severely tested by the American Civil War and found totally inadequate for a nation under arms. Little significant development had taken place in the 55 years preceding the war. As the strain on the articles caused by the expanded size of the army began to take effect, statutory "patches" were applied in an effort to make the articles responsive to the conditions of general armed conflict. Many of these provisions expired at the close of the war. The Code of 1874 was primarily an attempt to draw them into the framework of the military code itself as a part of the permanent legislation.

As the scope of the battlefield expanded through the use of modern means of transportation in warfare, greater decentralization of judicial power resulted. The imperative interest of the field commander in discipline was recognized by allowing him, in time of war, to execute certain death sentences upon confirmation by the commanding general in the field, or the department commander.[68] These cases involved persons convicted as spies, mutineers, deserters, or murderers. This provision prompted one contemporary writer to remark:

> **It would thus seem to have been the intention of Congress, in this enactment, to confer upon commanding generals, in time of war, a power to approve and execute such sentences adequate to the strict necessities of discipline and no more. It is clearly essential to discipline and to maintename of order in the theatre of active military operations that commanders in the field should have power to carry such sentences into effect.**[69]

The war had also indicated that division sized units were not always directly under the control of a general court-martial convening authority. The temporary legislation authorizing

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[65] AW 1806 art. 71.
[66] Act of May 29, 1830, ch. 179, 4 Stat. 417.
[67] Rev. Stat. § 1342 (1875) [hereafter cited as AW 1874 art.—].
[68] AW 1874 art. 105.
[69] DAVIS 544.

division and separate brigade commanders in time of war, to convene general courts-martial was revived.[70]

The precursor of the modern speedy trial requirement arose in response to an event involving a commander's disciplinary power during the Civil War,[71] and was reenacted in **1874.** In order to limit the power of the commander to hold an accused in custody without trial, it was provided that the case would be brought to trial within eight days after arrest, **or** as soon as a court-martial could be convened.[72] Although the discretionary language offered little relief to the enlisted man, the officer who had been placed in pretrial confinement had another article to which he could turn.[73] In the case of officers, a copy of the charges had to be served within eight days of his arrest, trial commenced within **10** days of arrest if at all possible, and within 40 days of arrest in any case. If not tried within that period the arrest was terminated.[74]

The congressional desire to carve out another small area of independence at the trial level involved changes in the courts-martial procedure. The judge advocate was no longer permitted to attend the closed sessions of the court-martial.[75] If the court desired any legal assistance from him, it wasnecessary to open the court and ask for such advice in the presence of the accused.[76] Although the defendant did not enjoy a defense counsel as a matter of right, he was at least made a competent witness in his own behalf,[77] and the failure to take the stand could not be used to create a presumption of guilt against him.

[70] **AW 1874** art. 73.

[71] Following the Union disaster at Ball's Bluff, Virginia. In Oct. **1861,** General C.P. Stone, the district commander, was held responsible and confined at Fort Lafayette. The cause of his arrest was not made known to him, nor were any military charges ever preferred. The provisions for automatic termination of arrest if no charges are filed was passed in Jul. **1862** in an effort to secure General Stone's release.

[72] **AW 1874** art. 70.

[73] **AW 1874** art. **71.**

"The officer released from arrest under this provision could be tried for the offense within twelve months of his release. The disciplinary interest of the commander found expression in another provision which is of little more than historic interest today. The Code required the court-martial to sit between the hours of eight in morning and three in the afternoon. An exception was made for those cases which "in the opinion of the officer appointing the court require immediate example." AW **1874** art. **94.** Utilization of this exception to **fix** the time of trial could not help but make a lasting impression on any court member.

[75] During hearings on the UCMJ in **1949,** one witness objected to taking the law member away from the court. The witness viewed the law member as the one person who was able to avoid command influence, and at the same time be available to assist the court during closed sessions. 1949 ***Hearings*** **832.**

[76] "Act of Jul. **27, 1892,** ch. **272,** art. **110,** sec. **2, 27** Stat. **277.**

[77] Act of Mar. 16, **1878,** ch. **37, 20** Stat. 30.

4. *The Articles of War of 1916.*[78]

The articles of 1916 represent the almost singlehanded efforts of The Judge Advocate General, Major General Enoch H. Crowder, to improve upon the "ancient code"[79] of military justice he was administering. Critics pointed out that in most respects his efforts did nothing more than codify existing general orders and customary practice.[80] Indeed General Crowder recognized that there would be little practical effect on the operation of military justice.[81] In any event, it was a significant step to grant custom the authority of statutory recognition. To do so was to remove the power of the commander to modify the customary rules as the needs of discipline require.

The views expressed during the legislative hearings are of particular interest. During the entire course of the hearings, only two witnesses appeared before the congressional committees — the Secretary of War and The Judge Advocate General. Their testimony made it clear that whatever else was done, the command nature of military justice was being retained. For example, as a "concession to the summary character of the military jurisdiction,"[82] the right of peremptory challenge was not granted. "Neither can we have the vexatious delays and failures of justice incident to the requirement of an unanimous verdict,"[83] nor condone the "vexatious delays incident to the establishment of an appellate procedure."[84]

The executive nature of the courts-martial system prompted The Judge Advocate General to refer to the President as the "supreme court in trials by courts-martial."[85] In addition the President, as commander-in-chief, became a legislator for the Army. An earlier statute[86] providing authority for the president to

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[78] Act of Aug. 29, 1916, ch. 418, sec. 3, 39 Stat. 650 [hereafter cited as AW 1916 art. —].

"Hearings on H.R. 25628 Before the House Committee on Military Affairs, 62d Cong., 2d Sess. 17 (1912) [hereafter cited as *1912 Hearings];* D. LOCKMILLER, ENOCH H. CROWDER 133-52 (1955).

[80] *See generally* Ansell, *Military Justice,* 5 CORNELL L.Q. 1 (1919).

[81] *1912 Hearings 43*:

"If Congress enacts this revision the service will not be cognizant of any material changes in the procedure, and courts will function much the same as heretofore.

". . .The revision will make certain a great deal that has been read into the existing code by construction in the last 106 years."

[82] *1912 Hearings* 31.

[83] *Hearings on S. 3191 Before a Subcomm. of the Committee on Military Affairs,* 64th Cong., 1st Sess. 9 (1916).

[84] *Id.* at 8.

[85] *1912 Hearings* 39.

[86] Act of Sept. 27, 1890, ch. 998, 26 Stat. 491.

issue tables of maximum punishment was continued in effect." The President was also authorized to provide rules of procedure and modes of proof in trials by courts-martial.[88] These provisions were viewed as further subjecting judicial functions to military command. The reason given for that conclusion was that while the "statute in terms confers the power upon the President as an administrative fact, it is not the President who will exercise it, but the Chief of Staff and the Judge Advocate General of the Army — ultra-military men."[89]

Nor was the field commander[90] overlooked in parceling'out the military authority of the courts-martial. The limitation that division and brigade commanders could convene general courts-martial only in time of war was eliminated." The small expeditionary forces used in the Spanish American War and the Phillipines Insurrection were utilized" as illustrations of the necessity for the President to be endowed with the authority to grant general courts-martial convening authority as circumstances required:[93]

> These are conditions which are liable to recur in any war in which the United States is likely to engage and are therefore conditions for which provision should be made."

The commander's inability to direct a change in the court's decisions led to an increased involvement in the process of reviewing cases. Prior enactments made no provision for the authority of the commander to approve lesser included offenses. The commander was faced with the prospect of either approving a conviction that he felt was not justified by the evidence or, if the court declined to accept his views on revision, disapprove it entirely. To avoid this result, the commander was authorized to approve such lesser included offenses as he felt were sustained by

[87] AW 1916 art. 45.
[88] AW 1916 art. 38.
[89] Ansell, *Military Justice,* 25 REP. PENN. **B.A.** 280, 300 (1919).
[90] AW 1916 art. 104 represented the first statutory recognition of the commander's power to impose administrative punishment without recourse to the judicial process.
[91] AW 1916 art. 8.
[92] Letter from Major General Enoch H. Crowder to Secretary of War Henry L. Stimson, Apr. 12, 1912 (reprinted S. REP. No. 229, 63d Cong., 2d Sess. 28-37 (1914)).
[93] **AW** 1916 art. 8.
[94] Letter from Major General Enoch H. Crowder to Secretary of War Henry L. Stimson, Apr. 12, 1912 (reprinted S. REP. No. 229, 63d Cong., 2d Sess. 28 (1914).

the evidence.[95] Coupled with this broad authority was the provision permitting the commander to suspend sentences in meritorious cases.[96]

The citizen-soldier who fought in World War I was faced with a radical change in the composition of the court-martial appointed to hear his case. Heretofore there was a distinct separation which prohibited Regular Army officers from sitting as members of the court trying volunteer or militia troops.[97] This disqualification was removed[98] and the traditional views of command and discipline shared by Regular officers were made applicable to all.

5. The Articles of War of 1920.[99]

The 1920 articles should be recognized as a turning point in the statutory development of military justice."' Heretofore, the various codes were characterized by an expansion and solidification of the commander's power to participate in the judicial process. The Articles of War of 1920 retained his position: however, Congress clearly outlined the judicial character of many facets of the commander's power. Even the most outspoken critic of military justice conceded that the new articles would "achieve its declared purpose 'to establish military justice' "[101] if properly administered.

For the first time, the articles required the convening authority to share his decision-making powers with noncommanders. Initially, the convening authority was required to forward the file to the staff judge advocate for advice prior to trial.'" He was also required to consult with his staff judge advocate for an opinion on the legality of the proceedings before taking his post trial action.[103] Although the commander was not required to follow the advice of

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[95] AW 1916 art. 49.

[96] AW 1916 art. 53.

[97] *E.g.*, AW 1874 art. 77.

[98] AW 1916 art. 4.

[99] Act of June 20, 1920, ch. 227, 41 Stat. 759 [hereafter cited as AW 1920 art. —].

[100] "'From 916 to the enactment of this legislation, the Judge Advocate General's Corps was the scene of a bitter dispute between The Judge Advocate General, Major General Enoch H. Crowder, and The Acting Judge Advocate General, Brigadier General Samuel T. Ansell. For a detailed discussion of this conflict and its impact on subsequent military jurisprudence see Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell,* 35 MIL. L. REV. 1 (1967).

[101] Ansell, *Some Reforms in Our System of Military Justice,* 32 YALE L.J. 146, 153 (1922).

[102] AW 1920 art. 70. Consideration was to be given to "what disposition of the case should be made in the interest of *justice and discipline." Id.* (emphasis added)

[103] AW 1920 art. 46.

his staff judge advocate, the fact that an independent review of all cases[104] would be made furnished some protection that his action would not be arbitrary and carpricious.

Though the commander retained rather broad discretion in appointing the members of the court, the articles limited eligibility to those officers with over two years service who were "best qualified for the duty by reason of age, training, experience, and judicial temperament."[105]

The power to return a case to the court-martial for reconsideration had long been recognized as an incident of the commander's power to appoint courts.[106] In 1920, the commander was prohibited from returning a case for reconsideration of an acquittal, a granted motion for a finding of not guilty, or for an increase in the punishment.[107] The commander's power to influence the ultimate issues to be decided by the court-martial had been foreclosed.[108]

6. The Articles of War of 1948.[109]

The Articles of War of 1920 continued in effect through World War **11.** The increased strain on the articles occasioned by the rapid expansion of the military forces produced such a volume of

[104] Those involving death, unsuspended dismissal, general officers, unsuspended dishonorable discharge, or confinement required review by a board of review before execution or confirmation. All other cases were reviewed for legal sufficiency in The Judge Advocate General's Office. AW 1920 art. 50%.

[105] AW 1920 art. 4. The addition of secret written ballots caused some concern that unqualified members would be allowed to sit: "[T]he old practice [oral voting beginning with the junior officer] had the advantage that it was possible to tell by the votes what officers were unable to sift and weigh evidence or to follow legal reasoning, and the president or other officers could, without disclosing the votes, intimate to the appointing authority the desirability of relieving them. Under the new practice it will be harder to detect incompetence on the court." Bauer, ***The*** *Court-Martial Controversy and the New* Articles *of War*, 6 MASS. L.Q. 61, 76 (1921). In CM 364100, Lill, 15 C.M.R. 472 (1954), characterization by the president, a general officer, of other members as "stupid as hell" was held to be nothing more than the full and free discussion required during deliberation.

[106] DAVIS 158. In Swaim v. United States, 165 U.S. 553 (1897), the Supreme Court approved the President's action authorized by Army regulations, in sending the then Judge Advocate General's case back to the court-martial on two occasions requesting a more severe sentence. "But although he cannot compel the court to adopt his views in regard to the supposed defects, he may, in a proper case, express his formal disapprobation of their neglect to do so." DAVIS 541.

[107] AW 1920 art. 40.

[108] Heretofore, the sentence and findings were kept secret since they did not become effective until approved by the convening authority. Since the convening authority was now prohibited from sending the case back for revision, the need for secrecy was gone, and provision was made to announce the sentence and findings at the trial. AW 1920 art. 40.

[109] Act of Jun. 24, 1948, ch. 625, sec. 201, 62 Stat. 627 [hereafter cited as AW 1948 art. —].

complaints that Congress was forced to consider interim legislation for the Army[110] until such time as the services could agree upon a uniform system of military justice.

The commander's duty to utilize judicial standards in deciding to refer a case to trial or take action on the results of trial was spelled out in the articles. He was required to find that the charges were "legally sufficient" and the convictions supported by proof "beyond a reasonable doubt."[111] In an effort to insure the independence of the legal advice upon which the commander was to rely in making these decisions a separate Judge Advocate General's Corps was established.[112] Assignment of judge advocate officers was to be made directly by The Judge Advocate General.[113] These officers were authorized to by-pass command channels in order to communicate directly with other judge advocates and The Judge Advocate General.[114]

Participation in the courts-martial fact-finding process was also expanded. The "Court of Honor"[115] theory that only officers have the requisite knowledge of discipline to sit as court members was abandoned. Even though the opinion was expressed that the "enlistedman who is selected for court-martial duty will probably be one of noncommissioned grade, because of his capacity and his experience,"[116] enlisted men were made eligible to sit as members when the accused so requested.[117] The court members were to exercise *their* independent judicial functions free from the influence of the commander and without fear of censure.[118]

IV. JUDICIAL FUNCTIONS OF THE COMMANDER UNDER THE UNIFORM CODE OF MILITARY JUSTICE

A. GENERAL

In the Uniform *Code of Military Justice,* Congress attempted to balance considerations of military necessity with the protection of individual rights. In so doing, both command and judicial duties

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[110] *Hearings on H.R. 2575 Before a Subcomm. of the House Committee on Armed Forces,* 80th Cong., 1st Sess. 1940 (1947) [hereafter cited as *1947 Hearings].*

[111] AW 1948 art. 47 *(b) (c).*

[112] 10 U.S.C. § 3072 (1964).

[113] AW 1948 art. 47 *(a).*

[114] *Id.*

[115] See note 5 *supra* and accompanying text.

[116] *1947 Hearings 2022.*

[117] AW 1948 art. 4.

[118] AW 1948 art. 88.

were imposed upon the commander as the individual responsible for administering the components of "military justice":

> Authoritative sources developed during congressional hearings on the Code indicated clearly that the Morgan Committee's several drafts were aimed at — and the statute, as adopted, reflects — a thoughtful balancing of the two essential ingredients of military justice: the ***justice*** element and the ***military*** element. Within the first of these terms, of course, I mean to include those safeguards and other legal values which are a part of informed criminal law administration in the civilian community. And by use of the second I mean principally to comprehend acute considerations of discipline in an abnormal social situation, limitations growing out of the burdens, realities and necessities of military operations, and the like."[119]

The result was a division of judicial power among the law officer, the court-martial, and the convening authority in which the commander was assigned a significant role as a judicial officer. This judicial status brought the commander into a direct confrontation with the decision-making power of the court-martial itself whenever he sought to maintain command control over its members and activity:

> The phrase "command control" is vague and indefinite to those not close to the picture. Let me explain what we mean by it. Under the existing system the same commanding officer is empowered to accuse the defendant, to draft and direct charges against him, to select the prosecutor and defense counsel from officers under his command, to choose the members of the court from his command, to review and alter the court's decision, and to change any sentence imposed.[120]

The powers to convene the court, refer the charges to trial, and take action on the findings and sentence are by no means exhaustive of the judicial functions a commander performs. They do, however, serve to illustrate the relation the commander's exercise of judicial functions bears to his responsibility for maintaining good order and discipline in the command, and whether this current relationship is so tenuous as to justify removing him entirely from the arena of military justice.

B. *COURT APPOINTMENT*

The principal objection voiced by witnesses during the committee hearings on the Code concerned the power of the commander to appoint the members of the court-martial,[121] To these

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[119] Brosman, ***The*** *Court:* ***Freer Than*** *Most,* 6 **VAND. L. REV.** 166, 167 (1953).
[120] 1949 Hearings 640.
[121] ***E.g.*** 1949 ***Hearings*** 627, 646.
[122] 1949 Hearings 640.

witnesses "control is exercised by reason of the fact the participants in the courts — the judges, the prosecutors, and the defense counsel — are subject to the full command of the officers who appointed them, and that their service careers are in his hands."[122] Accordingly, the only way to prevent the court members from being improperly influenced in their judicial activity by the commander, as they saw it, was to discontinue the commander's power to appoint the court,[123] and remove him from any responsibility in this area of military justice.

This suggestion was not new in the historical development of the commander's power[124] and has been consistently resisted by the military establishment as an impracticable provision which would hinder those responsible for the conduct of military operations. This latter view was accepted by Congress[125] and recognition given to the fact that acts which are rights in the civilian community may constitute direct challenges to the commander's authority to successfully accomplish his assigned mission:

> Take the business of telling off the boss, that is an inalienable right of an American citizen. If you tell off the sergeant or commissioned officer, that is a military offense. In civilian life, if you do not like your job, you quit it. If you do not like your job in the Army and quit, that is called desertion in wartime and it carries very serious consequences. In civilian life if people decide they do not like the working conditions and walk off jointly, that is a strike. In the Army or in the Navy, that kind of an action is mutiny, which is one of the most serious offenses.[126]

However, retention of the commander's position as a convening authority[127] was not a complete vote of confidence since the remainder of the committee's efforts were expended in an attempt to provide additional safeguards against the abuse of his power.[128] Before examining the necessity for the commander's continued participation in this aspect of the judicial process, reference will be made to the nature of the appointing power, and the restrictions placed upon its exercise by the commander.

Initially, it should be recognized that the power to enforce violations of the punitive articles by convening general courts-martial involves a command function designed to insure that the

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[123] **1949** Hearings **652.**
[124] *See e.g.,* **S. 64** H.R. **367, 66th** Gong., **1st** Sess., arts. **10, 12** (a) **(1919).**
[125] H.R. REP No. **491, 81st** Gong., **1st** Sess. **7–8 (1949)** ; S. REP. No. **486, 81st** Gong., **1st** Sess. **6-6 (1949).**
[126] *1949 Hearings* **779.**
[127] UCMJ arts. **22–29.**
[128] *1949 Hearings* **606.**

commander has available responsible personnel to effectuate the basic purpose of the armed forces. The military establishment's existence can only be justified as an agency designed for fighting and winning wars:

> War is a grim business, requiring sacrifice of ease, opportunity, freedom from restraint, and liberty of action. Experience has demonstrated that the law of the military must be capable of prompt punishment to maintain discipline.[129]

In order to bring the utmost force of the nation to bear upon the enemy, it is necessary to take the undisciplined civilian and transform him into a member of the military team obedient to the will of the commander. Discipline is the method by which this is accomplished, and the court-martial is one manner of its accomplishment.

In a very real sense, military justice serves a different purpose than civilian criminal justice. One author[130] has characterized this distinction by calling military law "positive" in nature and civilian criminal law as "negative." His theory is that with few exceptions the function of the civilian criminal code is to prevent antisocial acts. If the individual refrains from engaging in that conduct which is proscribed, nothing more is required of him. On the other hand, military activity sometimes requires the soldier to perform affirmative acts which are disagreeable and often dangerous — a burden which the civilian is seldom called upon involuntarily to assume. Although this analysis tends to ignore a majority of the punitive articles dealing with civilian-type offenses, it does correctly point up the essential command feature of the power to convene general courts-martial, *i.e.*, the positive application of whatever means may be necessary "to send men obediently to their death."[131]

Even so, the appointment of courts-martial does have judicial aspects, although the Court of Military Appeals has only recently alluded to its judicial character:

> In military law, the convening authority performs a number of judicial functions. Initially, he has been authorized by Congress, acting within the provisions of Article I, Section 8, United States Constitution, to appoint and convene courts-martial, including the appointment of the judicial officers necessary to the conduct thereof.[132]

'"United States v. Quarles, 350 U.S. 11, 29 (1955) (dissenting opinion).

[130] Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of the Court of Military Appeals*, 34 N.Y.U.L. REV. 861, 868-69 (1959).

[131] *1949 Hearings* 780.

"United States v. Nix, 15 U.S.C.M.A. 578, 580, 36 C.M.R. 76, 78 (1965) (dictum).

The rationale for the Court's opinion is not clear although Judge Kilday believes that "[t]he power of courts-martial to try criminal cases and impose punishment, as delineated in the Code, is like that of any civilian Federal criminal court, an exercise of the soverign judicial power of the United States."[133] Thus, the Court equates the functioning of a court-martial to the exercise of constitutional powers under article III, and by that method endows the convening authority with judicial functions in calling the court into being.

In the opinion of this writer, the Court of Military Appeals has failed to appreciate the constitutional foundation of the courts-martial.[134] The Supreme Court, noting that by "the very nature of things, *courts* have more independence in passing on the life and liberty of people than do military *tribunals*,"[135] concluded by saying:

> We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article **3** courts as adjudicators **of** guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property.[136]

If the court-martial is not an article III court as the Supreme Court indicates, the commander is exercising executive powers, albeit pursuant to legislative grant, in appointing the court as an agency to deal with breaches of discipline.

Nevertheless, the Court of Military Appeals' conclusion that the appointing power is judicial may be accepted even though its rationale is rejected. The definition **of** judicial functions set forth in Chapter II may be utilized to define the commander's power to appoint the members of the court as judicial without doing violence to the nature of courts-martial. Initially it may be said that the commander in selecting the personnel of the court performs those duties which devolve upon the clerk of the court and the jury commissioner under federal law.[137] This selection

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[133] *Id.*

[134] This criticism is not meant to suggest that constitutional principles are inapplicable to the court-martial. *See, e.g.,* United States v. Tempia, **16** U.S.C.M.A. **629, 37** C.M.R. **249** (1967), and United States v. Whisenhant, **17** U.S.C.M.A. **117, 37** C.M.R. **381 (1967).**

[135] United States v. Quarles, **350** U.S. **11, 17 (1965)** (emphasis added).

[136] *Id.*

[137] "**28** U.S.C. § **1864 (1964).** The statute does not establish a method of selecting jurors but leaves it to the discretion of the jury commissioner. *See* United States **v.** Flynn, **216** F. 2d **354 (2d** Cir. 1954), *cert. denied,* **348** U.S. **909** (1954), *rehearing denied,* **348** U.S. **956 (1954).** This decision power is non-delegable and no third party may influence its making. Walker v. United States, **93** F. **2d 383** (8th Cir. 1937), *cert. denied,* **303** U.S. **644** (1937), *rehearing denied,* **303** U.S. *668* **(1937).** *But see* Thiel v. Southern Pacific Co., **328** U.S. **217 (1946).**

process is nondelegable though he may look to his staff for assistance.[138] In selecting the membership the commander is seeking an agency to determine the issues between contending parties. It is desirable for him to have free choice in the selection,[139] but the ultimate goal is "[a] method of selection which uses criteria reasonably and rationally calculated to obtain jurors meeting the statutory requirements for service."[140] "Since the "use of juries as instruments of public justice'[141] is at the heart of our judicial system, it would necessarily follow that the selection method of the personnel is so intimately connected with the organization of the court it cannot be considered other than judicial in nature.

An unsophisticated commander would have little difficulty in reading and understanding his power to appoint courts-martial under the Code. The clear and concise language of the Code purports to authorize him to select those members who are "in his opinion"[142] best qualified. The commander might properly conclude that the composition of the court is a matter for his sole determination even to the extent of varying its composition in order to control the severity of sentences. Indeed, a similar opinion was held by a former member of the Court of Military Appeals.[143] However, the judicial side of the selection process is clearly in the ascendancy under the Court of Military Appeals, and the commander's power to select members with similar strong views on the need for discipline has been sharply curtailed.

The simplicity of the language used in the Code is deceptive to the uninitiate for if the selection process indicates "the appear-

[138] *See* CM 400981, Owens, 27 C.M.R. 658 (1959).

[139] *See* United States v. Deain, 5 U.S.C.M.A. 44, 17 C.M.R. 44 (1954) (concurring opinion).

[140] United States v. Crawford, 15 U.S.C.M.A. 31, 39, 35 C.M.R. 3, 11 (1964).

[141] Smith v Texas, 311 U.S. 128, 130 (1940).

[142] UCMJ art. 25 (d) (2): "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

[143] "It cannot be disputed that a convening authority is legally free to shift the membership of courts-martial at will, if he feels that trials within his command have resulted too frequently in acquittals or in inadequate sentences. He may rotate and substitute trial counsel, defense counsel and law officers to taste, and may, if he wishes, appoint courts-martial composed of 'hangmen' of established reputation. . . .The point is that he *may do* so — and for virtually any sort of purpose — with practical immunity within the framework of the present Code." United States v. Isbell, 3 U.S.C.M.A. 782, 790, 14 C.M.R. 200. 208 (1954) (dissenting opinion of Judge Brosman) (emphasis in original). However, in United States v. Williams. 11 U.S.C.M.A. 459, C.M.R. 275 (1960), the Court rejected a contention that the convening authority could withdraw a case from a court that had been adjudging light sentences.

ance of impurity,''[144] the commander will be deemed to have abused his discretion. "Impurity" will not be found merely because the commander appoints qualified members to a court-martial for the sole purpose of trying just one case,'" as the accused has no inherent right to be tried by a particular court as long as the selection process is not unfairly weighed against him. In choosing the members, the commander may not select those officers whose orientation is primarily directed to crime prevention, detection, and control. In ***United States v. Hedges,***[146] the Court, by analogy to civilian occupations, found a court improperly constituted when its members consisted of "an attorney general, a sheriff of a county, a chief of police of a city, an investigating agent for the state, and a warden of a penitentiary.''[147] In ***Hedges,*** Judge Latimer acknowledged the members were individually competent, but in his view the cumulative effect of their presence was to deprive the accused of the impartial membership envisioned by the Code. Moreover, the appointment of a court member with legal qualifications was discouraged in an effort to assure the impartiality of the court-martial:

> If the president of a general court-martial — freely selected as he is by the convening authority, possibly more concerned with military discipline than with law administration, and almost certainly less will informed within the latter sphere under ordinary circumstances — is able to usurp the judgelike functions of the law member, then, we are much afraid, at least one barrier interposed by Congress in the path **of** what has been popularly characterized as "command influence" has been weakened, if not removed.[148]

The problem of appointing enlisted personnel as court members continues to present a problem to the commander. Article 25(*d*)[149] of the Code prescribes standards for selection which would normally be satisfied only by the more experienced noncommissioned officers. In selecting these "old soldiers," the commander is more apt to secure court members favorably disposed to the necessity of maintaining good order and discipline in the service.[150] However,

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[144] ''United States v. Hedges, **11** U.S.C.M.A. **642, 645, 29** C.M.R. **458, 461** (1960) (concurring opinion).

[145] ***See*** United States v. Kemp, **13** U.S.C.M.A. **89, 32** C.M.R. **89 (1962).**

[146] **11** U.S.C.M.A. **642, 29** C.M.R. **458 (1960).**

[147] *Id.* at **645, 29** C.M.R. at **461** (concurring opinion).

[148] United States v. Berry, **1** U.S.C.M.A. **235, 2 41** C.M.R. **141, 147 (1952).** Conduct of an attorney-member of a special court-martial will be closely scrutinized to assure he does not unduly sway the opinions of the untrained members. See United States v. Sears, 6 U.S.C.M.A. 661, **20** C.M.R. **377 (1956).**

[149] See note **142** *supra*

[150] *1949 Hearings* **724.**

in United States *v.* Crawford,'"'the Court of Military Appeals held that all enlisted personnel are eligible to serve regardless of their rank, and a majority of the Court was of the opinion that any deliberate exclusion of lower grades is improper. But on the same day, the Court approved a selection process in which *only* enlisted men of the top three grades were considered for appointment, and cited the Crawford case.[152] The commander is thus placed in the unenviable position of avoiding a 'willy nilly' recourse to the routine duty roster''[153] by treading the thin line between looking to the senior noncommissioned officers as a convenient and logical source of members with the requisite qualifications, and the prohibitions of the Crawford case.

The effective power to appoint, as a judicial act, the legal personnel of the court was withdrawn from the commander by the Code, Both the counsel[154] and the law officer[155] must be certified by The Judge Advocate General as competent to perform their duties before they can be appointed by the commander. Although the decision to certify is administrative in nature,[156] the effect is to deprive the commander of any substantial discretion in the matter — an essential element of a judicial function. This division of responsibility for the administration of military justice and the authority over the legal practitioners presents unique problems to the convening authority.

For example, field commanders were informed by The Adjutant General that in convening general courts-martial they will:

> [T]hereafter appoint as law officer only a judicial officer or such other officer as may be expressly designated for that duty by The Judge Advocate General. Except for this administrative limitation upon who shall be eligible for appointment as law officer the program will in no way affect the powers, duties, and prerogatives of the convening authority relating to the administration of military justice.[157]

The directive was an implementation of the "judicial circuit" program designed to insulate the law officer from local consid-

[151] 15 U.S.C.M.A. 31, 35 C.M.R. (1964).

'-'United States v. Mitchell, 15 U.S.C.M.A. 59, 35 C.M.R. 31 (1964).

[152] United States v Crawford, 15 U.S.C.M.A. 31, 40, 35 C.M.R. 3, 12 (1964). Nevertheless the broad discretion granted the commander will operate as a bulwark against judicial interference only if the members so chosen are in fact fair and impartial. Id. at 41, 35 C.M.R. at 13 (separate opinion of Kilday, J.).

[154] UCMJ art. 27 (*b*).

[155] UCMJ art. 26 (a).

[156] *See In re* Taylor, 12 U.S.C.M.A. 427, 31 C.M.R. 13 (1961).

[157] Dep't of Army Letter, AGAO-CC 213-3, 27 Oct. 58, from The Adjutant General of the Army to commanders exercising general courtmartial jurisdiction, subject: Law Officer Program.

erations of a command nature that might have influenced the convening authority or other participants in the trial. This separation of the law officer from the scene of events was once thought to be so complete as to preclude him from reviewing the case in advance of trial.[158] Fortunately, this situation no longer exists,[159] and the law officer may now familiarize himself with the file to discharge his responsibility as a trial judge more efficiently.

This increased independence has placed many of the judicial functions which the commander is empowered to perform in potential conflict with the law officer's authority.[160] The activity of the Court of Military Appeals in enhancing the position of the law officer at the expense of the president of the court and the commander led one writer to comment:

> During the debates on the Uniform Code, opponents of Article 26 complained that comparisons between the law officer and a civilian judge were misleading since the former was not in truth given the powers of the latter. The Court of Military Appeals has gone a long way toward eliminating the basis for this objection. If Congress failed to create a law officer in the image of a Federal judge, the Court is determined to succeed.[161]

Even the administrative appointment of the defense counsel is a morass from which any commander is fortunate to extricate himself. The mere fact of appointment does not guarantee counsel is representing the accused and empowered to act for him.[162] Neither security matters[163] nor the need for haste in taking a deposition[164] will permit the appointment of military counsel to

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[158] *See* United States v. Fry, 7 U.S.C.M.A. 682, 23 C.M.R. 146 (1957) (dictum).

[159] *See* United States v Mitchell, 15 U.S.C.M.A. 516, 36 C.M.R. 14 (1965).

[160] *See, e.g.*, Gale v. United States, 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967) (convening authority directs law officer to reconsider ruling that defendant was denied speedy trial); United States v. Johnpier, 12 U.S.C.M.A. 90, 30 C.M.R. 90 (1961) (obtaining convening authority's views on proof of offense not charged); United States v. Knudson, 4 U.S.C.M.A. 587, 16 C.M.R. 161 (1954) (motion for continuance); ACM 10994, Robinson, 20 C.M.R. 816 (1955) (motion to amend). *But* see United States v. Nix, 15 U.S.C.M.A. 578, 36 C.M.R. 76 (1965), where the law officer erred in not directing compliance with the convening authority's pretrial "judicial order" for a psychiatric evaluation: "He was without authority to proceed pending compliance therewith." *Id.* at 582, 36 C.M.R. at 80.

[161] Miller, *Who Made the Law Officer a "Federal Judge?"* 4 MIL. L. REV. 39, 77, (1959). After noting the president of the court is no longer the central figure in a trial, the Court spoke of the law officer's duty to "quell the lay members of the court, regardless of their rank and position, and enforce his rulings to the utmost." United States v. Burse, 16 U.S.C.M.A. 62, 66, 36 C.M.R. 218, 222 (1966).

[162] *See* United States v. Miller, 7 U.S.C.M.A. 23, 21 C.M.R. 149 (1956).

[163] United States v. Nichols, 8 U.S.C.M.A. 119, 23 C.M.R. 343 (1957).

[164] United States v. Brady, 8 U.S.C.M.A. 456, 24 C.M.R. 266 (1967).

act in place of individual counsel. Even though the appointment power as an administrative matter remains in the convening authority, it would appear the effective power to appoint counsel lies in the hands of the accused:

> [The accused] is entitled to select counsel of his own choice, and may object to being defended by the person appointed if he desires to do so. Reviewing authorities can always reverse convictions where failure to appoint an officer has substantially injured the accused.[165]

Notwithstanding the lack of effective appointment power, the commander is neverless required to take personal action to determine the availability of a particular lawyer:

> The question is one requiring the exercise of the convening authority's discretion in light of all the circumstances, including the duties assigned the requested officer, milita ry exigencies, and similar considerations — in short, "a balance between the conflicting demands upon the service" [or present] a sound reason for denying to the accused the services of the representative whom he seeks.[166]

Although the accused may select the defense counsel of his choice, the commander is responsible for the adequacy of that defense. In *United States v. Isbell,*[167] the Court discussed the commander's responsibility for instructing untrained court members in words of equal applicability to the defense counsel:

> [T]he responsibility of a commanding officer for the maintenance of discipline within his command and the proper conduct of courts-martial cannot be questioned His responsibility in the field of military justice is equally clear. Members of courts-martial are selected from his command
>
> Moreover, when members of courts-martial demonstrate their unfamiliarity with the requirements of the Code or the Manual, the necessity for additional instructions, especially on the matters relating to their deficiencies, is mandatory, if courts-martial are to serve a useful purpose.[168]

'"United States v. Goodson, 1 U.S.C.M.A. **298,** 300, **3** C.M.R. **32, 34 (1952).** While the convening authority may ***relieve*** appointed counsel, only the accused may ***excuse*** him. ***See.*** United States v. Tavolilla, 17 U.S.C.M.A. **395, 38** C.M.R. **193 (1968)**

[166] United States v Cutting, **14** U.S.C.M.A. **347, 351** C.M.R. **127, 131 (1964).**

[167] 3 U.S.C.M.A. **782, 14** C.M.R. **200 (1954).**

[168] *Id.* at **786, 14** C.M.R. at **204.** While the theory of the pretrial lecture as an educational device has been generally sustained, it has been limited to such "general orientation on the operation of court-martial procedures and the responsibilities of court members" as to render its giving unnecessary. United States v. Davis, **12** U.S.C.M.A. **576, 581, 31** C.M.R. **162, 167 (1961).** And, in United States v. Wright, 17 U.S.C.M.A. 110, **37** C.M.R. **374** (1967), where the staff judge advocate gave his lecture to the law officer, trial counsel, defense counsel, accused and members of the court, the timing was considered crucial: "The scene which suggests itself is that of a director appearing before the cast

The best way to measure the ability of counsel is to observe their conduct in the courtrooom[169] even though the presence of the staff judge advocate,[170] as the commander's representative, may risk charges of interference with the judicial process. The commander's interest in the legal capability of his defense counsel is more than academic and may well exceed his interest in well-trained court members. Whenever the defense counsel fails to measure up to the professional standards of adequate representation required by the Court of Military Appeals, the commander will be faced with the unhappy prospect of retrying the case.[171] Nevertheless, it is difficult to visualize a situation in which command interest in the defense counsel's activity would not present a danger of unlawful command influence.[172]

A similar situation exists with regard to the position of the trial counsel *vis-a-vis* the commander. Here, however, the convening authority's interest in the manner of the trial counsel's performance has been recognized:

> Since the responsibility for supervising the orderly and effective administration of military justice rests with the convening-authority, he is thus — in many instances — confronted with a choice between the spectre of command control, on the one hand, and the stricture of inadequate presentation, on the other. It is difficult for us to comprehend how he may safely navigate this legal-administrative Scylla and Charybdis unless he is accorded some measure of freedom in advising and instructing prosecuting prosecution personnel.[173]

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of a play, immediately before the curtain is to rise, to give them final instructions. At that point in the proceedings the law officer is the judge; and if any instructions as to the role and responsibilities of the court members are deemed necessary, they should, and must, come from him." *Id.* at 111-12, 37 C.M.R. 375-76.

[169] *See* United States v. Self, 3 U.S.C.M.A. 568, 13 C.M.R. 124 (1953).

[170] The staff judge advocate "may go into the courtroom as a spectator, but he should not assume to act as though he has a proper place in the trial of the cause." United States v. Wright, 17 U.S.C.M.A. 110, 112, 37 C.M.R. 374, 376 (1967).

[171] *See* Cobbs, *The Court of Military Appeals and the Defense Council*, 12 MIL L. REV. 131 (1961).

[172] *E.g.*, United States v. Huff, 11 U.S.C.M.A. 397, 29 C.M.R. 213 (1960). In United States v. McMahan, 6 U.S.C.M.A. 709, 717-18, 21 C.M.R. 31, 39-40 (1956), Judge Latimer stated: "However, he [defense counsel] has a solemn duty to defend unreservedly the interests of the accused he has sworn to protect, and fear of disfavor should not deter him from using all honorable means to protect his client's cause. No system of justice can flourish if the representation afforded an accused person is to be neglected because of fear of reprisals. Nor can military justice succeed if those officers who must defend an accused inadequately protect him because they dare not assert every right guaranteed him by the Code."

[173] United States v. Haimson, 5 U.S.C.M.A. 208, 218, 17 C.M.R. 208, 218 (1954).

Indeed the trial counsel may be analogized as the commander's representative in securing the ends of discipline by utilization of the judicial process:

> Unlike the court member and the law officer, the trial counsel is at least in some degree a partisan, and a functionary charged with the duty of insuring that all competent evidence against an accused person is presented — once the convening authority has decided that trial is warranted."[174]

Upon this basis, the commander[175] and his staff judge advocate[176] may provide their trial counsel with detailed instructions on trial procedure without becoming accusers or disqualified to perform other duties. It is only necessary that they do not "reduce counsel to the likeness of an automaton."[177]

In contradistinction to his concern for the proper administration of military justice in the command involved in appointing legal personnel, it is not the formal act of appointment that lies at the root of the commander's desire to retain the function in relation to court members. Nor should the question be who is best qualified to select members of judicial temperament.[178] The heart of the matter is who will control the members of the force which has been placed at the commander's disposal to accomplish his mission?

At the outset, it should be kept in mind that the Army is neither a social-service organization nor a rehabilitation center even though in many individual cases it is called upon to perform those functions. Its officers and noncommissioned officers are charged with planning and waging campaigns, commanding troops, and engaging in military activity designed to prepare for armed conflict. The secondary place assigned to courts-martial duty was abruptly, though aptly, enunciated by the Supreme Court:

> Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases the basic fighting purpose of armies is not served.[179]

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[174] *Id.*

[175] "United States v. Blau, 5 U.S.C.M.A. 232, 17 C.M.R. (1954).

[176] United States v. Mallicote, 13 U.S.C.M.A. 374, 32, C.M.R. 374 (1962).

[177] United States v. Haimson, 5 U.S.C.M.A. 208, 17 C.M.R. 208, 218 (1954).

[178] The Court of Military Appeals has recognized that the usual practice is for the staff judge advocate to propose a list of "candidates" to the commander. See United States v. Erb, 12 U.S.C.M.A. 524, 31 C.M.R. 110 (1961).

[179] United States v. Quarles, 350 US. 11, 17 (1955).

Only the commander is properly situated to determine whether the needs of the service are best served by the presence of a particular member on the court-martial.[180] To the extent officers and enlisted men are no longer subject to his control, they have been as effectively removed from the operation of the command as though incapacitated by enemy action.[181]

This issue becomes crucial when the necessity arises to excuse members from courts-martial duty to perform other more important functions. Prior to trial, the commander exercises broad discretion to add[182] or excuse members[183] in the absence of an improper motive. In general he will know which officers are free at the time of appointment to perform court-martial duties. It is more difficult for him to accurately forecast what future duties his officers may be required to perform. In wartime, it may well be "absolutely impossible, for a commander to determine in advance what men he could spare for a panel."[184] But it is precisely at this future date, after arraignment, in an unforeseen case, for example, that the commander's power to react to the exigencies of the service is most sharply curtailed.[185]

The "good cause" required to excuse members[186] after arraignment necessitates something more than the ordinary, normal

[180] At the outset, it should be stated that no change in the law should be favored unless there is a pressing need for the change recommended. This need is, however, not so clearly perceived as one might imagine, for need is always relative. Involved may be considerations of saving manpower, conserving funds or supplies, effecting better justice, or — and this is the facet of military justice that is too often overlooked by civilian groups — avoiding the adverse impact of a complicated and drawn out judicial procedure on discipline and justice in time of war. It is hardly necessary to point out that, no matter how desirable an ideal system of justice may be, if it impedes or hampers the efficient performance of the military function to protect our country, we may lose all in an attempt to be absolutely protective of the rights of individuals." Mott, ***An Appraisal of Proposed Changes in the Uniform Code of Military Justice***, 35 ST. JOHN'S L. REV. 300 **(1961)**.

[181] During the ***1949 Hearings*** **1114,** the effect of a separate pool from which court members could be selected by a legal officer was discussed: "PROFESSOR MORGAN. I am strongly of the opinion that it would as a matter of fact disrupt the commanding officer's control over his officers for other than courts martial [duties]. That is true.

"MR. ANDERSON. We all recognize that."

[182] United States v. Whitley, **5** U.S.C.M.A. 786, **19** C.M.R. **82 (1956)**.

[183] "MCM ¶ 37.

[184] ***1949 Hearings*** **1114.**

[185] UCMJ art. 29 ***(a)*** provides: "No member of a general . . . courtmartial may be absent or excused after the accused has been arraigned except for physical disability or as a result of a challenge or by order of the convening authority for good cause."

[186] "The peculiar nature of the power to excuse jurors was recognized by Professor Morgan: "This article recognizes the military necessity of transforming officers from court-martial duties to other functions in unusual situ-

conditions of military life. [187] The intervening duty must have a critical nature somewhat akin to military emergency[188] in order to deprive the accused of his right "to be tried in accordance with the requirements of the Uniform Code."[189] Lest the commander believe that any prattling of the magic words "military emergency" will suffice, he has been advised by the Court that it will view any excusal "with circumspection."[190]

Similar restrictions on the removal power are found applicable to the law officer[191] and the defense counsel,[192] but with far less impact on the commander. Since the power to select the law officer has been effectively eliminated,[193] restrictions upon his removal are of realtively minor administrative concern. Nor is it likely that the commander would have any necessity to recall counsel from their appointed tasks during trial to perform other military duties.

With the foregoing problems of the commander in mind, the proposals for reform may be considered. To properly evaluate any suggested alternative, the evil sought to be remedied must be kept in mind:

> The ***mere exercise*** of administrative discretion in giving of leaves or furloughs, in making recommendations for promotions, in assigning men to various **jobs** and details, and in preparing fitness reports gives the commanding officer ample ***opportunity*** to manifest his displeasure at the manner in which those under his control have handled a case.[194]

It is appropriate to advance the view that change for the sake of change is not desirable. The plan adopted must give reasonable

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ations. Assuming honest administration, it is a wise provision; but it must be conceded that it carries risk of abuse. If the Code were applicable only in peacetime, this article could hardly be justified." Morgan, ***Background*** *of* ***the Uniform Code*** of *Military Justice*, 6 VAND. L. REV. 169, 175 (1953).

[187] *See* United States v. Boysen, 11 U.S.C.M.A. 331, 29 C.M.R. 147 (1960). Good cause must be shown in the record itself for the government's burden "is not met by the inclusion on appeal of an **ex *parte*** statement or affidavit purporting to establish such course, post ***hoc."*** United States **v.** Metcalf. 16 U.S.C.M.A. 153, 157, 36 C.M.R. 309, 313 (1966).

[188] ***"See*** United States v. Grow, 3 U.S.C.M.A. 77, 11 C.M.R. 77 (1953).

[189] ""United States v. Allen, 5 U.S.C.M.A. 626, 641, 18 C.M.R. 250, 265 (1955). (concurring opinion).

[190] "United States v. Grow, 3 U.S.C.M.A. 77, 83, 11 C.M.R. 77, 83 (1953).

[191] United States v. Boysen, 11 U.S.C.M.A. 331, 29 C.M.R. 147 (1960).

[192] Apparently good cause must exist to excuse the defense counsel *prior* to arraignment as well. ***See*** United States **v.** Tellier, 13 U.S.C.M.A. 323, 32 C.M.R. 323 (1962).

[193] See note 157 *supra* and accompanying text.

[194] Keeffe & Moskin, ***Codified*** Military *Injustice*, 35 CORNELL L. Q. 151, 158 1949. (emphasis added).

assurance that it will eliminate whatever problem of unlawful command influence exists in court appointment before a complete break with military tradition will be justified.[195]

The plan proposed by the American Bar Association appears to be representative of all reform movements, and deceptive in its simplicity:

> The remedy suggested is a simple one: the power to convene the court, to appoint assigned defense counsel and to order the sentence executed would be taken from the commanding officer and vested in the Army Judge Advocate General's Department or its equivalent in the other services. Commanding officers who under existing law convene the court would be required to make available to Army or higher headquarters a panel of officers available and qualified for court-martial service. From such panel the Judge Advocate General at Army or higher headquarters ... would select the general court to adjudicate the cases in a particular division. That court could, of course, be composed of officers selected entirely from divisions other than the division in which they are assigned to preside.[196]

It should be pointed out that the proponents of such a program recognized that the same members the commander would have used will be appointed to make up the panel from which the legal officer would select his court.[197] Upon the conclusion of their tour as jurors, these members will return to the administrative and command control of the appointing authority who made them available. This would normally be the same officer whose discipline may have been adversely affected by a light sentence or a finding of not guilty. Such an officer, if disposed at all to improperly visit his wrath upon the court members, would hardly be disinclined to do so merely because the actual selection of the officer as a court member was accomplished by the legal officer. Moreover, it was recognized during the House Hearings on the Code that influence of this type need not be illegal to be effective:

> MR. **ELSTON.** Mr. Kenney, I readily see what might be involved if you had the separate panel. Rut actually if a commanding officer wanted to

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[195] Able and sincere witnesses urged our committee to remove the authority to convene courts-martial from 'command' and place that authority in judge advocates or legal officers, or at least in a superior command. We fully agreed that such a provision might be desired if it were practicable, but we are of the opinion that it is not practicable. We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and, regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations." H.R. REP. No. 491, 81st Cong. 1st Sess. 8 (1949).

[196] *1949 Hearings* **728–29.**

[197] *1949 Hearings 652.*

exert influence he could do it in the appointment of the members of the panel just about as much as he could in the appointment of the members of the court.

MR. RIVERS. Surely.[198]

To this the proponents advance the view that in such a case the officers in one division would try the cases in another division.[199] Stating their position exposes its undesirability. The plan presents the incongruous situation that the officers of a highly motivated, well-trained division would be taken from their duties to try the cases of a division whose officers have failed to instill the necessary ***esprit de corps*** in their men to avoid breaches of discipline. Under these circumstances the press of duties and human nature itself could result in a lowering of the standards of military justice as the commander made available only those officers he could do without, ***i.e.,*** his least effective officers.

Although, in the view of this writer, the commander must be permitted to retain control over his line officers, there appears to be no overriding reason for him to control the appointment of the trial team. The proponents of this plan call for separate divisions for trial and defense counsel unrelated to the command structure similar to the law officer program.[200] It can be assumed that like benefits would accrue to the trial teams. The spectre of illegal command influence would be abolished by placing the control of counsel in the hands of other lawyers.[201] They would then be measured, not by the number of convictions or acquittals obtained, but by the effectiveness of their advocacy.[202] Those persons who particularly desire trial work would be permitted to join the program and specialize in it. This would necessarily result in that degree of expertise which characterizes the work of the professional law officer.

One reservation to independent trial divisions should be noted. The commander is charged with the responsibility of insuring the prompt trial of all cases.[203] Tactical and training situations necessitate the movement of units. Witnesses leave the service, or are victims of combat. To try the case while evidence is available,

[198] ***1949 Hearings*** **1125-26.**

[199] ***1949 Hearings*** **652, 718.**

[200] ***See*** Keeffe, JAG ***Justice in Korea,*** **6** CATHOLIC U.L. REV. **1, 18 (1956).**

[201] Attempts at unlawful command influence are not confined to commanders, however. See United States v. Kitchens, **12** U.S.C.M.A. **589, 31** C.M.R. **175, (1961).**

[202] ***See*** Rydstrom, ***Uniform Courts of Military Justice,*** **50** A.B.A.J. **749 (1964.)**

[203] UCMJ arts. **10, 30(**b), **98.**

the memories of witnesses fresh, and to achieve realization of the preventive effect inherent in prompt punishment are desirable features of any criminal system. To the extent all legal personnel are beyond his control, the commander is unable to insure those ends. In addition, the instances of command influence over the trial counsel are rare,[204] and short of unethical tactics should be of no benefit to the accused. Thus it can be argued that the commander's interest in the prompt and vigorous prosecution[205] of offenders may be sufficient to justify his continued administrative control over the trial counsel.

C. REFERENCE TO TRIAL

If reference is made to the legislative hearings,[206] one would conclude that the power to refer a case to trial involves a command function because of the military nature of courts-martial.[207] In fact, the House Subcommittee on Armed Services specifically amended the proposed draft of the Code to insure that the decision to refer a case to trial would be made by the commander.[208] That the committee clearly understood the nature of the change being proposed is reflected in their comments:

> MR. ELSTON .... Does not that section practically leave it up to the staff judge advocate to say whether or not there is sufficient evidence to warrant the charge even being made?
>
> MR. LARKIN. It requires, Mr. Elston, that he review the findings of the investigation and advise the convening authority whether, in his opinion, there is sufficient evidence. It is left, however — that is, the decision is left to the convening authority, which is the present procedure.
>
> MR. ELSTON. Do you think the language "unless it has been found that the charge alleges an offense under this code and is warranted by evidence" pretty much makes the staff judge advocate the final judge?
>
> MR. LARKIN. No, I think not. If it does, it should not.[209]

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[204] *See e.g.*, United States v. Kennedy, 8 U.S.C.M.A. 251, 24 C.M.R. 61 (1957).

[205] Provided the trial counsel does not interject the views of the convening authority, he may strike hard but fair blows against the defendant. *See* United States v. Doctor, 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1956); United States v. Olson, 7 U.S.C.M.A. 242, 22 C.M.R. 32 (1956).

[206] *1949 Hearings* 1006-09.

[207] *1949 Hearings* 606.

[208] *Compare* H.R. 2498 art. 34: "The convening authority shall not refer a charge to a general court-martial for trial unless it has been found that the charge alleges an offense under this code and is warranted by evidence indicated in the report of investigation.", with UCMJ art. 34: "The convening authority may not refer a charge to a general court-martial for trial unless he has found that the charge alleges an offense under this chapter and is waranted by evidence indicated in the report of investigation." (emphasis supplied),

[209] *1949 Hearings* 1006.

Their efforts produced a requirement that, as a prerequisite to invoking the punishment power of the Code, the commander must find "that the charge alleges an offense under this [Code]and is warranted by evidence indicated in the report of investigation."[210]

Despite the efforts of Congress to make exercise of the referral power a command function, recognition of its judicial nature was foreshadowed by Judge Latimer when he wrote:

> Thus it may be seen that something roughly analogous to the federal procedure of preliminary examination and grand jury indictment is obtained in the military through the use of a formal pretrial investigation and convening authority consideration.[211]

In United States *v. Roberts,*[212] the Court adopted Judge Latimer's analogy and held that since the referral power is judicial,[213] it is personal to the commander and cannot be delegated to his staff judge advocate. A similar conclusion was reached concerning selection of the particular court to try the case even though comparison with civilian assignment procedures would indicate this power was nonjudicial in nature.[214]

The judicial rather than command nature has been emphasized in the commander's disqualification to refer a case to trial when he is the accuser.[215] The test in determining whether the commander is an accuser is whether he "was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter."[216] To reach this result the Court is necessarily rejecting the personal relationship between the

[210] UCMJ art. 34(*a*).

[211] Latimer, *A Comparative Analysis of Federal and Military Criminal Procedure,* 29 TEM. L.Q. 1, 5 (1955).

[212] 7 U.S.C.M.A. 322, 22 C.M.R. 112 (1956).

[213] The Court's analysis is correct since the "probable cause to believe the accused is guilty of the crime charged" in referring a case to trial is no less judicial than that involved in "probable cause to believe that the things to be seized are on or within the premises" utilized in authorizing a search. *Compare* United States v. Moffett, 10 U.S.C.M.A. 169, 170, 27 C.M.R. 243, 244 (1959), *with* United States v. Hartsook, 15 U.S.C.M.A. 291, 294, 35 C.M.R. 263, 266 (1965).

"'United States v. Simpson, 16 U.S.C.M.A. 137, 36 C.M.R. 293 (1966). "The first thought that suggests itself is that the assignment procedure in this case is similar to the assignment procedure that prevails in many civilian courts. In those courts, when a case is marked ready for trial, the assignment commissioner, or like official of the court, prepares a ready calendar and, as practicable, assigns cases therefrom to a particular judge . . . . The widespread nature of the practice in the civilian community tends to support the conclusion that the assignment of a case to a particular judge or division of the court is a function that the judicial authority may properly delegate to the administrative staff." *Id.* at 139, 36 C.M.R. at 295.

[215] UCMJ art. 22(*b*).

"'United States v. Gordon, 1 U.S.C.M.A. 255, 261, 2 C.M.R. 161, 167 (1952).

superior and the subordinate which is the essence of command[217] in favor of the impartiality required of the judicial officer. But if the commander's action can be described as "official,"[218] in the sense that his interest is in seeing that the accused will be brought to trial on charges appropriate to the offense committed[219] without regard to personal considerations, the judicial requirement will be satisfied.

To characterize the power as judicial may be of small comfort to the accused since many features of the referral process designed for his protection may operate against him. At the outset, there must be a preliminary finding that there is sufficient evidence of the accused's guilt to justify trial.[220] The thoroughness of the required preliminary investigations and the review by the staff judge advocate may lead some court members to feel that "the accused must be guilty or else this general court-martial would never have been ordered."[221] The commander must also determine what level of court is justified and in doing so sets the maximum punishment. Reference to a general court-martial necessitates a finding that it is the "lowest court that has the power to adjudge an appropriate and adequate punishment."[222] In making this decision the commander must consider all extenuating and mitigating factors.[223] The continued emphasis placed on military justice within the Army establishment insures that these features are well known to all officers and enlisted personnel likely to be selected for courts-martial duty.[224]

The commander's responsibility for the administration of military justice does not end with reference to trial. For example, he

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[217] Military discipline and order is based upon obedience to superiors and every commander jealously, but rightly, requires compliance and frowns on disobedience." United States v. Marsh, 3 U.S.C.M.A. 48, 52, 11 C.M.R. 48, 52 (1953).

[218] United States v. Jewson, 1 U.S.C.M.A. 652, 5 C.M.R. 80 (1952).

[219] *See* United States v. Smith, 8 U.S.C.M.A. 178, 23 C.M.R. 402 (1952).

[220] UCMJ art. 34(a).

[221] United States v. Squirrel], 2 U.S.C.M.A. 146, 152, 7 C.M.R. 22, 28 (1953) (dissenting opinion) (dictum). However, members *expressing* this belief are disqualified to sit on the case. United States v. Deain, 5 U.S.C.M.A. 44, 17 C.M.R. 44 (1954).

[222] MCM ¶ 33(h). It is error, to advise the court that reference to a general court-martial indicates the commander's desire for a punitive discharge. United States v. Lackey, 8 U.S.C.M.A. 718, 25 C.M.R. 222 (1958).

[223] MCM ¶ 33(h). It is error to argue that the commander has already considered those factors. United States v. Carpenter, 11 U.S.C.M.A. 418, 29 C.M.R. 234 (1960).

[224] And may have been behind the president's remark in United States v. Stringer, 5 U.S.C.M.A. 122, 127, 17 C.M.R. 122, 127, (1954), that if the government's case were not properly presented the court might "hang the man innocently."

may terminate the proceedings when the military situation makes a continuation of the trial impracticable.[225] He may also withdraw the charges where a fatal variance has developed between the specifications and proof.[226] But once arraignment has taken place, good cause must be shown to withdraw charges in accordance with the "characterization of the reference for trial as a judicial act."[227] In *United States v. Williams*,[228] the Government contended that the "duty of the convening authority to see that crimes occurring within his command were punished appropriately,"[229] justified withdrawing the charges from a court adjudging light sentences. The Court summarily rejected the argument by pointing out that article 37 of the Code prevented the commander from substituting his judgment on sentencing matters for that of the court-martial. On the other hand, in *United States v. Stringer*[230] the Court of Military Appeals recognized that if events occuring in the trial itself are such as to preclude either the Government or the accused from receiving his day in court, the commander's authority to terminate the proceeding is clear:

> Thus, from the standpoint of maintaining general confidence in military law administration, it might properly have been deemed desirable to halt the proceedings as promptly as possible, and to begin them anew in a different forum.[231]

At first glance, the holding of the *Williams* case and the views expressed by Judge Brosman in *Stringer* appear to be inconsistent. However, when viewed together, the cases indicate that the commander's power to terminate a proceeding without jeopardy attaching requires more than a fear that correct results in a particular case will not be reached. The events justifying withdrawal of the charges must be such as would *necessarilypreclude* the court from conducting a fair trial and reaching a sound decision. In the later cases, the mistrial powers of the commander may be properly invoked as a concession to the unique position of the commander as a referring authority:

> Several reasons for the Congressional determination in this respect may be surmised. For one thing, the convening authority is apt to be in a

[225] MCM ¶ 56(b).
[226] "United States v. Ivory, 9 U.S.C.M.A. 516, 26 C.M.R. 296 (1958).
[227] United States v. Williams, 11 U.S.C.M.A. 459, 462, 29 C.M.R. 275, 278 (1960).
[228] 11 U.S.C.M.A. 459, 29 C.M.R. 275 (1960).
[229] *Id.* at 462, 29 C.M.R. at 278.
[230] 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954).
[231] *Id.* at 133, 17 C.M.R. at 133.

> relatively better position to ascertain whether, by reason of administrative or military factors, there is "manifest necessity" for the withdrawal of charges. Such military factors are, of course, to be found at the core of Wade v. Hunter, supra. Moreover, Congress may well have believed that inherently the parallelism between civilian and military law administration could not be complete as to mistrials. The civilian trial judge who declares a mistrial is not required to invoke the aid of an appellate agency to impanel a new jury and reopen the proceedings. Contrariwise, if charges are withdrawn from a court-martial, they cannot be brought before another tribunal without the participation of the convening authority in the form of an order re-referring the charges. Since the convening authority must thus enter the picture in any event, Congress may have thought it appropriate to permit him initially to withdraw charges under pressing circumstances. Perhaps too, it was considered that, if the convening authority noted during the progress of the trial the presence of errors which would lead to disapproval by him of findings of guilty — apart, of course, from insufficiency of the Government's evidence he should be allowed to terminate the proceeding instanter.[232]

Despite the potential indirect infringement on the court's prerogative to reach independent findings, the commander's power to refer cases to trial has not been seriously questioned.[233] In the **1947** House Hearings, witnesses accepted the proposition that the power to decide what cases should be tried was essential to the disciplinary function with which the commander was charged.[234] Nor was the power questioned in the House Hearings preceding the enactment of the Code.[235] The representative of the American Bar Association went **so** far as to suggest that a decision to request the civil courts to take jurisdiction over an offense should be made by the commander rather than offer a choice to the accused.[236] In light of their general desire to sever the relationship between the commander and the court-martial, it seeems strange these witnesses would accept the commander's referral power as a legitimate exercise of command prerogative since the commander must of necessity utilize the court-martial as an instrument of discipline whenever he refers a case to trial.

, Even though the power to refer a case to trial is not often an issue, can any improvement be made in the existing structure? It should be noted that the commander is placed in a precarious position by the Code. He must personally find that the specifications allege **an** offense and that the evidence supports the

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[232] *Id.* at **130, 17 C.M.R.** at **130.**
[233] See *e.g., 1949 Hearings* **1009.**
[234] *1947 Hearings* **1973, 1997, 2010-11.**
[235] *1949 Hearings* **636, 719.**
[236] *1949 Hearings* **727.**

charges.[237] These determinations involve legal principles that the ordinary commander is ill equipped to handle. As a matter of practice the decisions are normally made by the staff judge advocate in the form of "advice" to the commander.[238] Even so, the fact that the commander is enjoined to personally make these decisions is an open invitation to unlawful command influence. It is the course of least resistance for a staff judge advocate in advising his commander, consciously or unconsciously, to color his legal opinion to reflect what he believes the commander will decide on his own.[239]

This writer suggests that the provisions of the Code should be amended to conform to actual practice. The staff judge advocate should be charged with the responsibility of *finally* determining whether the charges are legally correct, and if there is sufficient evidence to support the charges. Only if the staff judge advocate concludes the charges are correct and there is sufficient evidence to support them would the case be referred to the commander for his consideration. The experience of the staff judge advocate should continue to be utilized by calling upon him to give his recommendations to the convening authority concerning the nature of the offense and the level of courts-martial deemed most appropriate. The commander would be left free to decide whether the conduct of the accused had a sufficient impact on his command to warrant trial, and if so what type of court was necessary to deal with the breach of discipline. The commander would thus be released from the burdensome task of deciding legal questions but would retain the disciplinary power over his command. The staff judge advocate would be insulated from the commander in that his decisions on purely legal questions would be final and not subject to review at the command level.

D. *REVIEW OF FINDINGS AND SENTENCE*

The development of the court-martial as an instrument of command discipline was accompanied by a requirement for review and confirmation by the convening authority before the sentence could be executed.[240] The power to return the case to the court-

[237] UCMJ art. 34(*a*).

[238] *Id.*

[239] Although no witness testifying before the House Armed Services Subcommittees in either 1947 or 1949 admitted allowing the commander to influence *his* legal judgment, the practice was apparently quite common among *other* legal personnel.

[240] "Unlike the judgment in a civilian criminal court which is self-executing upon its adjudication, the sentence of any court-martial under the Anglo-

martial for reconsideration together with the power of review operated to prevent a miscarriage of justice at a time when few lawyers were involved in the judicial process. This inchoate nature of the findings and sentence led Winthrop to note:

> While the function of a court-martial is, regularly, completed in its arriving at a sentence or an acquittal, and reporting its perfected proceedings, its judgement, so far as concerns the ***execution*** of the same, is incomplete and inconclusive, being in the nature of a ***recommendation*** only. The record of the court is but the report and opinion of a body of officers, addressed to the superior who ordered them to make it, and such opinion remains without effect or result till reviewed and concurred in, or otherwise acted upon, by him.[241]

The commander no longer has this revision power,[242] however, the requirement of express approval as a condition precedent to execution of the sentence was continued under the Code.[243] In this context, it appears Winthrop's view on the nature of the court's judgment "is as accurate a statement of the law today as it was when originally made many years ago."[244]

At the outset it should be noted that the commander's post trial duties concern the power to approve, disapprove, or modify the findings and sentence, to grant clemency in the form of mitigation, suspension, and remission, and to order the execution of the sentence. The power to grant clemency and order execution of the sentence need not detain us long, since neither involves a judicial function. Once an appropriate sentence has been affirmed, the execution of that sentence is an administrative duty.[245] It involves neither discretion nor judgment since nothing remains to be done "save the purely formal and ministerial business of execution"[246] in the form prescribed by law.

The powers of remission, suspension, and mitigation could be considered either judicial or executive:

American system has no force or effect unless and until approved by the convening authority and/or superior military authority. This striking fundamental variance from our civil practice accounts for the somewhat peculiar automatic appellate system that is provided for in the military." Fedele, ***Appellate Review in the Military Judicial System,*** **15** FED. B.J. **399,** 400 **(1955).**

[241] **WINTHROP 447** (emphasis in original) (footnote omitted).

[242] UCMJ art. **62** (b).

[243] UCMJ arts. 60, **61,** 64, **65, 71***(d)*.

[244] Re, ***The Uniform Code of Military Justice,*** **25** ST. JOHN'S L. **REV. 155, 178, (1951).**

[245] ***See generally*** Connor, ***Reviewing Authority Action in Court-Martial Proceedings,*** **12** VA. L. REV. 43 **(1925).**

[246] United States v. Sonnenschein, **1** U.S.C.M.A. 64, **72, 1** C.M.R. **64, 72 (1951).**

> If one prefers to call the influence of those human qualities in the mitigation of a sentence the exercise of the judicial function of determining legal appropriateness, the description is proper . On the other hand, if one wishes to call it clemency, that description also is proper.[247]

However, approval of an ***appropriate*** sentence, regardless of the nature of the act, is a right the accused enjoys. An ***inappropriate*** sentence cannot be justified by remission, mitigation, or suspension as a matter of executive grace.[248] In determining whether to exercise the executive power of "pardon" under the Code, the commander may properly utilize military considerations in making his decision:

> Congress did not merely invest the commander with authority to decide whether to dismiss or drop a charge before trial. It also conferred upon him the power to free an accused from the penalty of any offense committed by him in violation of the Uniform Code, if he believes such action would further the accomplishment of the military mission. By virtue of that power, a commander having court-martial jurisdiction can set aside even a judicial determination of guilt.[249]

Accordingly, it is submitted these powers are properly "regarded .. as sounding in executive clemency and not a part of the judicial"[250] process.

The power to act on the findings and sentence, however, is judicial in nature.[251] This conclusion is based upon the peculiar position of the commander as an alternate juror:

> [He must] consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgement is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining [the legality of the proceeding].[252]

In this capacity the commander has the independent power and duty to weigh the evidence, judge the credibility of witnesses.[253]

[247] United States v. Lanford, 6 U.S.C.M.A. 371-79, 20 C.M.R. 87, 94-95 (1955) (dictum).

[248] *See* generally United States v. Coulter, 3 U.S.C.M.A. 657, 662, 14 C.M.R. 75, 80 (1954) (concurring opinion).

[249] United States v. Kirsch, 15 U.S.C.M.A. 84, 91, 35 C.M.R. 56, 63 (1964). (dictum).

[250] United States v Sonnenschein, 1 U.S.C.M.A. 64, 72, 1 C.M.R. 64, 72 (1951).

[251] See United States v. McCoskey, 12 U.S.C.M.A. 621, 31 C.M.R. 207 (1962).

[252] Runkle v. United States, 122 U.S. 543, 557 (1887).

[253] A grant of immunity involves accepting the credibility of the witness. In United States v. White, 10 U.S.C.M.A. 63, 64, 27 C.M.R. 137, 138 (1958), Judge

and determine controverted questions of fact.[254] The "informed judgment"[255] sought by the Code must be unencumbered by directives from higher headquarters,[256] custom,[257] or preconceived notions of the commander.[258]

Additional support for the judicial nature of the review power may be found in the standards the commander is required to utilize in approving the findings. It is not sufficient for him to find substantial evidence to support the findings as applied by appellate agencies.[259] Nor may he consider himself bound by the opinions of the fact finders.[260] In United States *v. Grice,*[261] the commander's test in approving the findings was set forth:

> [The convening authority must] apply the trial level test of sufficiency rather than the more restrictive test reserved to appellate tribunals. He must be satisfied in his action that the accused is guilty ***beyond a reasonable doubt.***[262]

Thus the commander is equated to a court of original jurisdication as a forum for the de novo adjudication of the controversy. If the trial court is to be considered as exercising judicial functions, the commander must be equally empowered.[263]

The exceedingly broad discretion granted the commander to approve findings and sentence is the most distinguishing feature of this power. At the time of the enactment of the Code, some members of Congress feared that the language proposed did not adequately reflect the intention to assure the commander's com-

Ferguson noted: "He must weigh the evidence, pass on the credibility of witnesses and satisfy himself from the evidence that the accused is guilty beyond a reasonable doubt. It is asking too much of him to determine the weight to be given this witness's testimony since he granted the witness immunity in order to obtain his testimony. This action precluded his being the ***impartial judge he must be to properly perform his judicial functons."*** (emphasis added).

[254] Where the convening authority testifies for the prosecution, he may not later review the case since he would be required to evaluate the conflicting evidence. United States v. McClenny, 5 U.S.C.M.A. 507, 18 C.M.R. 131 (1966). A contrary result is reached when there is no conflict over the issue upon which the convening authority testifies. United States v. Taylor, 5 U.S.C.M.A. 623, 18 C.M.R. 147 (1955).

[255] United States v. Lanford, 6 U.S.C.M.A. 371, 381, 20 C.M.R. 87, 97 (1955).

[256] United States v. Prince, 16 U.S.C.M.A. 314, 36 C.M.R. 470 (1966).

[257] "United States v. Plummer, 7 U.S.C.M.A. 630, 23 C.M.R. 94 (1957).

[258] United States v. Wise, 6 U.S.C.M.A. 472, 20 C.M.R. 188 (1955).

[259] *See* United States v. Jenkins, 8 U.S.C.M.A. 274, 24 C.M.R. 84 (1957).

[260] *See* United States v. Johnson, 8 U.S.C.M.A. 173, 23 C.M.R. 397 (1957).

[261] 8 U.S.C.M.A. 166, 23 C.M.R. 390 (1967).

[262] *Id.* at 169, 23 C.M.R. at 393 (emphasis in original).

[263] Anything less "is the last analysis to abdicate this most important function and to leave the members of the court supreme in the fleld of the facts." Connor, ***Reviewing Authority Action in Court-Martial Proceedings,*** 12 VA. L. REX. 43, 59 (1925).

plete authority over findings and sentences. As a result, the words "in his discretion" were added to articles 64.[264] No similar amendment to the review powers of the boards of review[265] or Court of Military Appeals[266] was made. Taking his cue from Congress, Judge Quinn viewed the commander's power to act as a reviewing authority as practically unlimited:

> Article 61 [sic][64] of the Uniform Code gives the convening authority nearly unlimited power over the findings and sentence. If he so desires, the convening authority can set aside the findings of guilty and the sentence, and dismiss the charge, irrespective of the sufficiency of the evidence of guilt and the appropriateness of the sentence adjudged by the court-martial.[267]

With respect to the findings, the convening authority, just as the court, is limited to a review of the evidence in the record if he desires to approve the findings.[268] In *United States v. Duffy*,[269] one commander was thoroughly chastized for misunderstanding his judicial function:

> We cannot conceive of a concept more repugnant to elementary justice than one which would permit appellate reviewing authorities to cast beyond the limits of the record for "evidence" with which to sustain a conviction. It would not be tolerated in the civilian community for a single moment, and, so long as this Court sits, it will not be tolerated in the military His conduct as such an official was not only unlawful: it was lawless. It struck at the very heart of the Uniform Code and the current dispensation of military justice, and it cannot be condoned.'[270]

On the other hand, in *United States v. Massey*,[271] a conviction was reversed because the staff judge advocate advised the convening authority that he could not examine evidence tending to establish the innocence of the accused which was not introduced during the trial. Thus, it appears that in order to approve the findings, the commander is limited to the record, but to disapprove the findings he not only may, but must, look outside the record in the exercise of his unlimited discretion.

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[264] *See 1949 Hearings* 1182-85.

[265] UCMJ art. 66.

[266] UCMJ art. 67.

[267] Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225, 251 (1961).

[268] *See* CM 370896, Pratts-Luciano, 15 C.M.R. 481 (1954).

[269] 3 U.S.C.M.A. 20, 11 C.M.R. 20 (1953).

[270] *Id.* at 23-24, 11 C.M.R. at 23-24.

[271] 5 U.S.C.M.A. 514, 18 C.M.R. 138 (1955). Involved were the results of a polygraph test and a sodium pentothal interview, neither of which are admissible before a court-martial.

A different, though no less judicial, criteria is involved in review of the sentence. In general, the Court feels that "justice is fostered by giving the reviewing authorities power to go outside the record of trial for information as to the sentence."[272] The purpose is to permit the assembly of all relevant information bearing upon the appropriateness of the sentence. For example, the commander may look to the accused's service record,[273] or he may properly request information as to other acts of misconduct committed by the accused provided the accused is offered an opportunity to rebut or explain any adverse information.[274] Indeed, the power is so broad that the commander may, in the words of Judge Brosman, consult "a guy named Joe."[275]

An illustration of the expansion of the commander's authority may be seen in the power of commutation. In ***United States v. Russo,***[276] the Court of Military Appeals reversed a long standing rule prohibiting the convening authority from commuting a death sentence to a dishonorable discharge and confinement at hard labor. In dissenting, Judge Latimer saw the ruling as a "Pandora [sic] box"[277] which would result in sentences "changed to such an extent that [they] will never be recognized."[278] Recognition of Judge Latimer's prowess as a fortune teller was not long in coming. In one case the convening authority was permitted to commute a suspension from rank for twelve months to a forfeiture of twenty-five dollars per month for twelve months.[279] In ***United States v. Prow,***[280] a punitive discharge was commuted to confinement at hard labor for three months and a forfeiture of thirty dollars per month for three months. The only limitations in this field appear to be the prohibition against an increase in the severity of the sentence[281] and the requirement that judicial authority is not to be utilized for administrative convenience:

> In short, the convening authority may [not] change the nature of a penalty merely because that sought to be approved is administratively more convenient than that imposed by the court-martial. Thus, it may appear desirable to a convening authority to convert an adjudged sentence

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[272] United States v. Lanford, 6 U.S.C.M.A. 371, 379, 20 C.M.R. 87, 95 (1955).

"United States v. Lanford, 6 U.S.C.M.A. 371, 20 C.M.R. 87 (1955).

--'United States v. Smith, 9 U.S.C.M.A. 145, 25 C.M.R. 407 (1958).

''United States v. Coulter, 3 U.S.C.M.A. 657, 663, 14 C.M.R. 75, 81 (1954) (concurring opinion).

[276] 11 U.S.C.M.A. 352, 29 C.M.R. 168 (1960).

[277] *Id.* at 362, 29 C.M.R. at 178.

[278] *Id.*

[279] United States v. Christensen, 12 U.S.C.M.A. 393, 30 C.M.R. 393 (1961).

"[280] 13 U.S.C.M.A. 63, 32 C.M.R. 63 (1962).

[281] *See* United States v. Brice, 17 U.S.C.M.A. 336, 38 C.M.R. 134 (1967).

> which did not extend to a punitive discharge into one which effects such a separation rather than either to retain an accused in confinement for a lengthy period or to invoke separate administrative discharge proceedings. ***That he may not so combine his judicial and administrative authority scarcely requires extended citation of authority.***[282]

The foregoing aptly illustrates why the Court of Military Appeals has concluded that "the convening authority possesses a judicial power far in excess of that which resides in any other single judicial office."[283] Whether this omnipotent power should continue to repose in the hands of the commander will now be considered.

It is interesting to note that the basic criticism[284] of the commander's power of review is not that the innocent are punished but that the sentences of the guilty are disproportionate to the crimes.[285] By a rather curious line of reasoning, the critics conclude that the only way to prevent this manifestation of command influence is to remove the power of the commander to review cases:

> The retention of the clemency review by the Convening Authority represents a failure to entrust to the court the responsibility of deciding the case and fixing the sentence on the evidence before it.[286]
>
> What is objectionable is the resulting practice whereby the court imposes an excessively Severe sentence upon the assumption that the commanding officer who convened the court will reduce it to an extent that he will consider just and conducive to the maintenance of discipline. This practice is tantamount to a delegation of the court's judicial function to the convening authority. . . The observation seems valid that the practice of reducing excessive sentences imposed by a court-martial will lead to a distrust of the system.[287]
>
> Only if the members of a court-martial know that the convening authority will not review their sentence can the court be depended upon to do its duty by fixing the sentence at the proper length.[288]

As early as 1921, one writer foresaw the possibility that courts

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[282] United States v. Johnson, 12 U.S.C.M.A. 640, 643, 31 C.M.R. 226, 229 (1962) (emphasis added).

[283] United States v. Nix, 15 U.S.C.M.A. 578, 580-81, 36 C.M.R. 76, 78-79 (1965) (dictum).

[284] *E.g.*, *1947 Hearings* 1948.

[285] *See generally* Keeffe & Moskin, *Codified Military Injustice*, 35 CORNELL L.Q. 151 (1949).

[286] Keeffe, *Universal Military Training With or Without Reform of Courts Martial?*, *33* CORNELL L.Q. 465, 472 (1948).

[287] Re, *The Uniform Code of Military Justice*, 25 ST. JOHN'S L. REV. 155, 179, (1951).

[288] Keeffe & Moskin, *Codified Military Injustice*, 35 CORNELL L.Q. 151, 169 (1949).

might adjudge excessive sentences relying on the commander to reduce them to appropriate levels. However, he viewed the abolishment of the commander's power to request reconsideration of the findings as the evil to be avoided:

> Today it is a travesty on justice to say a manifestly guilty man must go free because a trial judge has gone astray on his law or a jury has been ignorant or prejudiced. One of the best features of the old court-martial procedure was that such miscarriages of justice could be corrected without the necessity of a new trial ...The small proportion of cases where they changed their findings and sentence shows that they only acceded to the suggestions of the reviewing authority in cases where they themselves recognized that they had made a mistake. Under the new rule it may be necessary for courts-martial to decide all doubtful points in favor of the prosecution, as some civil judges do, because errors of that kind can be corrected by higher authority, and to impose a severe sentence in every case, leaving it to the reviewing authority to mitigate it.[289]

The argument that the review power results in an abdication of the court's duties might have some merit in commands where pretrial agreements are extensively utilized.[290] On the whole, however, the cause and effect relationship between the power of review and the duty to adjudge an appropriate sentence on the part of the court-martial is too tenuous to merit extended consideration.[291] Indeed if the position were sound, it would preclude any appellate agency from exercising review authority on the theory that the court would defer to the supervisory authority's consideration of appropriateness.

The convening authority's power to address himself to consideration of the legality of findings and sentence as well as clemency matters is without parallel in the civilian community. In the opinion of the Court of Military Appeals, it is also unique in the military system:

> Sounding as it does in appellate review as well as what might be termed junior-grade confirmation, this hybrid differs essentially from all which has gone before and all that follows.[292]

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[289] Bauer, *The Court-Martial Controversy and the New Articles of War*, 6 MASS. *L.Q.* 61, 78 (1921).

[290] "In the agreement the convening authority, in return for the accused's offer to plead guilty, agrees to reduce or drop a charge or disapprove any sentence adjudged by the court in excess of a stipulated amount. In time the court-martial may come to feel that its decision is an empty gesture since an appropriate sentence has already been agreed upon.

[291] MCM ¶ 76*a*(4). Judge Latimer, dissenting in United States v. Story, 10 U.S.C.M.A. 145, 147, 27 C.M.R. 219, 221, (1959), noted "[t]he time is long past when military courts should give an excessive sentence in reliance on higher headquarters adjusting the inequities."

[292] "'United States v. Sonnenschein, 1 U.S.C.M.A. 64, 71, 1 C.M.R. 64, 71 (1951).

It may well be that the peculiarity of his position rather than actual harm resulting from it is what draws the attention of the critics.[293]

The commander's duty to review legal questions developed initially at a time when lawyers did not often participate in the courts-martial process. Since this situation no longer exists, the opinion has been expressed that any review at the convening authority level "is an anachronism"[294] that should be eliminated in its entirety. There can be no doubt that the commander is poorly equipped by training or judicial temperament to decide if the findings and sentence are "correct in law." One need only refer to United *States v. Duffy*[295] to illustrate the dangers inherent in allowing the commander to override his staff judge advocate in matters of law. But the conclusive argument is to be found in the words of the Supreme Court:

> To the extent that those responsible for performance of this primary function [armed conflict] are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.[296]

The Manual requires the commander to include a letter of explanation with cases forwarded to The Judge Advocate General whenever he "takes an acton different from that recommended by his staff judge advocate."[297] It is a matter of sheer speculation whether the paucity of cases involving the Manual provision results from the commander accommodating himself to the views of his staff judge advocate, or vice *versa*. Nevertheless, this danger may be avoided by the simple expedient of granting the staff judge advocate the final authority to review the case for legal sufficiency. This writer is of the opinion that few commanders desire to review extended records of trial, if, indeed, they do at all, in order to come to grips with complex legal problems that often baffle the most learned of the legal profession. Surely this duty, by default, if

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[293] The Court will assure that the appellate process "represents what may be termed a 'one-way street' in the accused's favor in which he can only win, and never lose." United States v. Wilson, 9 U.S.C.M.A. 223, 226, 26 C.M.R. 3, 6 (1958).

[294] REPORT TO HON. WILBUR M. BRUCKER, SECRETARY OF THE ARMY, BY THE COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE. GOOD ORDER AND DISCIPLINE IN THE ARMY at 161 (1960) [hereafter cited as POWELL REPORT].

[295] 3 U.S.C.M.A. 20, 11 C.M.R. 20 (1953); see text accompanying note 269 *supra*.

[296] United States v. Quarles, 350 U.S. 11, 17 (1955).

[297] MCM ¶ 85*c*. In United States v. Sippel, 4 U.S.C.M.A. 50, 15 C.M.R. 50 (1954), the Court held the failure of the commander to forward a letter explaining why he disagreed with the advice of the staff judge advocate was not prejudicial error particularly since the staff judge advocate was wrong.

not by training and experience, should be entrusted to the staff judge advocate.

Different factors must be considered before a decision to remove the clemency power from the commander can be made.[298] Every trial by general courts-martial directly affects the commander's utilization of manpower and the state of discipline in his unit. In addition to the motivating concepts of civilian penology, the commander must evaluate factors peculiar to the military: "[H]e must consider the accused's value to the service if he is retained and the impact on discipline if he permits an incorrigible to remain in close association with other members of the armed services."[299] During the course of the House Hearings on the Code two situations were outlined to the committee in which the commander's interest in the disposition of offenders was made clear:

> MR. LARKIN. The classic case that I think General Eisenhower stated in his testimony before your subcommittee last year was that even though you might have a case where a man is convicted and it is a legal conviction and it is sustainable, that man may have such a unique value and may be of such importance in a certain circumstance in a war area that the commanding officer may say "Well he did it all right and they proved it all right, but I need him and I want him and I am just going to bust this case because I want to send him on this special mission."[300]
>
> MR. SMART. I well remember General Collins' testimony before the committee 2 years ago when he talked about his authority, as of that time, to empty the whole guardhouse if he wanted to. He had a bunch of people out there who had been convicted. They were getting ready to go to combat and he wanted to give them a chance to work themselves out from under a serious conviction.
>
> He suspended their sentences and let them all go back to combat. If they made good he remitted the entire sentence.[301]

Although these situations arose during a period of global war, protests concerning our involvement in Southeast Asia may well call for similar treatment.[302]

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[298] *See* POWELL REPORT at 162.

[299] United States v. Barrow, 9 U.S.C.M.A. 343, 345, 26 C.M.R. 123, 125 (1958).

[300] *1949 Hearings* 1184.

[301] *1949 Hearings* 1185.

[302] In August 1965, a soldier stationed at Fort Benning staged a seven-day hunger strike to dramatize his refusal to fight in Vietnam. Upon conviction of malingering in violation of article 115, UCMJ, the convening authority, pursuant to a pretrial agreement, reduced the adjudged sentence to a bad conduct discharge, total forfeitures and confinement at hard labor for one year. See CM 413397, Belton, 36 C.M.R. 602 (1966). The sentence was suspended and Belton joined the First Division in Vietnam. His subsequent courageous action in

Reference to trial by general courts-martial, in the commander's eyes, constitutes a prima facie determination that the accused should be separated with a punitive discharge if convicted as charged. Under our adversary system of justice the accused need not present any evidence in the pretrial stages concerning the crime itself or the factors motivating him to commit the act alleged. These matters may come to light for the first time at the trial. The commander's clemency power offers him one further opportunity to evaluate the seriousness of the accused's conduct in light of all factors developed during the trial. This interrelation of clemency and discipline results in the personal nature of military justice for "[i]t is only at [the convening authority]level of the appellate procedure, that [the accused] can project his traits of character and his attitudes in a personal interview."[303]

The effect of the proposal made in this section is to sever the responsibility for reviewing cases into those duties which the staff judge advocate and the commander are respectively most competent to perform. The staff judge advocate's opinion of legal matters should be final and not subject to review by the lay commander. At the same time, the commander should retain the final power to approve or disapprove the conviction and sentence based upon his view of the need for discipline and proper utilization of personnel in his command. This suggestion is not intended to deny the commander the opinions, recommendations, or advice of his staff judge advocate as to the content of an appropriate sentence. However, it is suggested that in the final analysis the appropriateness of a sentence in a particular case will best be determined by the commander in the exercise of his power in enforcing discipline.

V. CONCLUSIONS AND EXHORTATIONS

The historical development of the commander's relationship to military justice displays a recognition that the court-martial is an instrument of the executive branch for the enforcement of discipline. The Code did little to alter that basic concept.[304] The "thrust of the legislation was to grant autonomy to the court-martial"[305] in the sense that it is no longer subject to the direction

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combat resulted in a remission of the suspended sentence and promotion to the grade of private first class.

[304] United States v. Coulter, 3 U.S.C.M.A. 657, 660, 14 C.M.R. 75, 78 (1954). "See Reid v. Covert, 354 U.S. 1, 36 (1957).

[305] United States v. Stringer, 5 U.S.C.M.A. 122, 142, 17 C.M.R. 122, 142 (1954) (concurring opinion) (dictum).

of the commander *while* exercising its fact finding powers.[306] The primacy of the court-martial under the Code as the adjudicating forum of first instance was clearly spelled out by the Court of Military Appeals:

> In a special and peculiar sense the sentence of the law for adjudged misconduct—military or civilian—is the product of a trail court. It alone, of all agencies of the law, is authorized to "adjudge" the law's penalty. True it is that review agencies are empowered to take varying sorts of action with respect to this phase of the trial court's task, but their function in this particular is secondary and derivative. They merely "approve" or "disapprove," "affirm" or "reverse." The trial court, on the other hand, "imposes" — it determines as an original, a basic, and a primary proposition.[307]

Nevertheless, the invocation of the power to "adjudge" is a clear utilization of the court-martial as an instrument of command. Only when precept and example, administrative elimination and non-judicial punishment have failed to achieve the desired result may the commander turn to trail by court-martial. While the degree of power involved in these methods may vary, the purpose remains the same, *i.e.*, to reestablish that state of good order and discipline upon which armies depend.

The ordinary connotation of the term "instrument of discipline" implies blind subservience by court members to the supposed or stated desires of the commander with only rudimentary obeisance to fundamental rules of fairness. However, if the term is understood to mean that the court-martial is an instrument of discipline in the sense that by utilizing fair procedures and independent evaluation in determining issues it serves discipline by timely and proper disposition of the offender, a different conclusion is reached. Within this context, if the court-martial is

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"This principle is clearly illustrated by United States v. Metcalf, 16 U.S.C.M.A. 163, 36 C.M.R. 309 (1966), where, *after arraignment,* the convening authority excused a member because of "prior knowledge" of the case. In holding the convening authority had no power to do so, the Court noted: "Finally, we think it clearly apparent that [the] Code, supra, Article 29, was intended to permit the convening authority to intervene in the trial and remove a member only for causes external thereto rather than as a part of the challenging process. ...

"Thus, we have pointed out that, once trial proceedings have commenced, matters incident thereto are normally to be settled by the court itself, without reference of the matter to the convening authority. ...Otherwise we would be faced with the consequence of having a court-martial's decision on a challenge for cause subjected to being immediately overruled during the trial by the convening authority's intervention and action. Yet, as we have noted previously, he has no such authority until the trial is completed and the record is before him for review.'' *Id.* at 157, 36 C.M.R. at 313.

"United States v. Brasher, 2 U.S.C.M.A. 60, 52, 6 C.M.R. 50, 52 (1952).

not an instrument of discipline, it is impossible to justify its existence, and to contend otherwise ignores the realities of military service.[308]

One may advocate the proposition that the court-martial is an instrument of command without requiring greater responsiveness on the part of the court to the will of the commander. There is nothing in the nature of military service to suggest that discipline and justice are mutually exclusive. Most commanders recognize that discipline[309] will be achieved more readily where there is confidence in the impartial application of the law.[310] To protect the soldier against the arbitrary commander, society can do no more than provide avenues of relief to the individual:

> The law still has degrees of harshness and courts and legislatures must act in reason. The possibility of individual abuse of power is ever present even under our Constitution but the probability of obliteration of any such tendency through judicial, executive or legislative action is the citizen's protection under the Constitution.[311]

Within the military this protection is provided in a system of appellate review more exhaustive than any available to most civilian offenders.[312] For those who arbitrarily violate the protection afforded the soldier under the Code, Congress has established criminal sanctions.[313]

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[308] In United States v. Kugima, 16 U.S.C.M.A. 183, 36 C.M.R. 339 (1966), Judge Ferguson, speaking for a unanimous court, recognized the importance of the court-martial as an aid to discipline: "Discipline is a function of command and, as it is to the commander concerned that all look as ultimately responsible for its effective enforcement, it is not surprising to note that it was to him that Congress entrusted the power to convene courts-martial." *Id.* at 185, 36 C.M.R. at 341. A somewhat contrary opinion was expressed by Judge Latimer in the early days of the Code: "[I]f anyone now believes that a court-martial is merely an agency of the commander, and governed solely by his whim, then he is too blind to see what has been spelled out by members of Congress." Address by Judge George W. Latimer, The Judge Advocate General's School, Charlottesville, Virginia, January 18, 1952.

[309] Although discipline is a function of command, discipline does not always mean punishment but "an attitude of respect for authority. . . which leads to a willingness to obey an order no matter how unpleasant or dangerous." POWELL REPORT at 11.

[310] *See e.g., 1949 Hearings* 800.

[311] United States v. Quarles, 350 U.S. 11, 43 (1955).

[312] UCMJ arts. 65-67, 69, 70. *See* United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). where the Court established a procedure for taking testimony when an issue of command influence is raised at the appellate level. In essence the case requires remand to a convening authority at a higher echelon of command than the original convening authority who will refer the case to a general court-martial where the law officer, in an out-of-court hearing, will hear testimony and enter findings of fact and conclusions of law on the issue presented.

[313] UCMJ arts. 37, 98. The committee was extremely doubtful that anyone would be prosecuted for violation of article 37 and concluded that all Congress

That the military system of criminal jurisprudence is somewhat different from that established in the civilian community cannot be disputed. Whether an adoption of civilian criminal law is desirable is another question since it must also be conceded that the systems of civilian criminal law and military justice operate under very dissimilar conditions.[314] Implicit in cases like Reid *v. Covert*[315] is a recognition that the peculiar nature of military service is such that courts-martial "probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."[316]

In many respects the commander's continued interest, as a judicial officer, in the process of criminal justice evolves from his command responsibilities during active military operations. Whatever we may desire as the standard of military justice in garrison situations, the Code must be equally applicable in time of war. The military lawyer and the infantryman alike must practice those skills in peacetime which they will need during conflict.[317] The Court-Martial Reports offer eloquent testimony that it is difficult enough to learn one system of justice thoroughly.

The changes proposed in this article are neither new nor entirely original. It is sufficient if the reader is informed of the obviously indispensable role the commander must play in any system of military justice. The proposals were not suggested as a sine *qua* non to insure fair trials, for, in the opinion of this writer, the courts-martial processes are unequaled in that regard.[318] However, they are changes which are designed to relieve the commander of duties which are not absolutely necessary to carry out the assigned mission of defending the Nation.

Nevertheless, the command element of the military should remain alert to recognize and accept improvements in its criminal law which do not obstruct the military purpose of the armed forces. On the other hand, military lawyers must be equally

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could do was express its opposition to command influence in the strongest term; *1949 Hearings* 1019–21.

Cf. Burns v. Wilson, 346, U.S. 137 (1953). Because of the dissimilarity, the civil "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 187 (1962).

[315] 354 U.S. 1 (1957). The Supreme Court held that a civilian dependent could not be tried by courts-martial for murdering her military spouse while stationed at an overseas base.

[316] United States v. Quarles, 350 U.S. 11, 17 (1955).

[317] The system must also be simple enough to be operated by inexperienced personnel called up during national mobilization. *See* Holtzoff, *Administration of Justice in the United States Army*, 22 N.Y.U.L. REV. 1, 7 (1947).

[318] *E.g. compare* United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9

prepared to heed the clarion call sounded by General William T. Sherman in 1879:

> I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.
>
> The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.
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> These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its value, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by even grafting on our code their deductions from civil practice.[319]

(1967), with Gilbert v. California, 338 U.S. 263 (1967).

[319] Reprinted in *1949 Hearings* 780.

FREEDOM OF SPEECH — AN EXAMINATION OF THE CIVILIAN TEST FOR CONSTITUTIONALITY AND ITS APPLICATION TO THE MILITARY*

By Major Jerome X. Lewis, II**

The author begins by discussing the history of freedom of speech and the first amendment. Turning to study the test usef by the Supreme Court in determining the breadth of the first amendment, he concludes that the Court "balances the interest" involved in each case to get the proper result. He concludes by suggesting that the same test should be used in cases involving military personnel and freedom of speech.

I. INTRODUCTION

In 1776, Thomas Paine observed that those were "the times that try men's souls."[1] Those were the times of oppression by a tyrannical monarch, by a distant Parliament, and by what had become an all-too-near army of occupation. Those were the times in which Englishmen of substance and standing in North America went to London in supplication to petition unsuccessfully for the redress of the wrongs visited upon them. Those were the times in which these same men, in despiration, pledged their lives, their liberty, and their sacred honor to declare their independence and give birth to a new nation. But ultimate victory on the field of battle was not destined to be their most difficult task. Still remaining for these men of courage and vision was the work of forging a system of representative government which would guarantee to its citizens fundamental freedom while at the same time being malleable and of sufficient strength to withstand the shocks and stresses imposed by domestic tumult and world cataclysm. The United States, with its Constitution, stands today as a living shrine to their genius.

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[1] THE COMPLETE WRITINGS OF THOMAS PAINE 50 (P. Foner ed. 1945).

But if those days of 200 years past tried men's souls, if during those times men were adrift upon the seas of uncertainty and doubt as to their future course, then these present times equally try patriots' souls. While the infant years of our Republic were sheltered by the vast expanses of the seas which served as barriers to corrupting ideologies and foreign interventionists, the ever accelerating advance of the sciences, particularly those of communications and weaponry, has exposed this Nation to the noxious philosophies as well as to the wholesome, to the grim spectre of nearly instant atomic desolation as well as to the miracles wrought by the peaceful uses of the atom. Some among us would mark the beginning of this century as the dawn of a new epoch, an epoch which holds challenges and rewards, threats and horrors undreamed of by our forefathers. There are also those among us who regard our Constitution as outmoded, overtaken by the events of recent history, unable to prevent this Nation from foundering on the social and political rocks and shoals that are presently hidden from our view. Such people point with incredulity and reprobation at the spectacle of extending the Bill of Rights to the confessed felon or even to those who would with violence overthrow our form of government. But yet it is from these things that America achieves its greatness and its moral strength. Another more difficult question would be to ask whether the delicate system of checks and balances between the legislature, the executive, and the courts envisioned by the framers of the Constitution can function where the arrival of a state of war is heralded by a rain of atomic devastation; or where, by gradual, almost imperceptable stages, our Nation finds itself spilling the life-blood of its youth in the defense of a distant besieged ally. In neither case would there be a formal declaration of war after due deliberation by the legislature. Likewise, in the conduct of foreign relations the executive agreement, unratified by the legislature and often unknown to it, has replaced the formal treaty. In recent years these questions have troubled the minds of constitutional scholars and others who look for regularity and orderliness in the conduct of our Nation's affairs.

On the other hand, what of the uproar generated by the multi-hued domestic bohemian, the pseudo-intellectual, and the dissenter who can be heard today on nearly any issue that divides men's minds? It is in this atmosphere that our youth are reared and from this environment that they enter into the military service. It is, therefore, not unexpected that there is today occasionally heard a dissenting voice raised from military ranks. Can they speak with the same constitutional safeguards as their

civilian friends? The answer is ascertainable only by inquiring into the freedom of speech accorded those in civilian society and comparing the application of the first amendment to those in both civilian society and military service.

II. THE FRAMERS' INTENT

Out of the lawyers' and jurists' penchant for "retrospective symmetry"[2] and their general aversion to the totally novel has grown the practice of delving deep into the past to rediscover long established principles which are consonant with contemporary thought. Accordingly, it is understandable that those who learned their childhood lessons in American history should view our founding fathers as victims of the severest suppression of the freedom of expression. Representatives of the Crown in North America were not undeservedly cast in the role of the oppressors of those who sought to question the acts of King George, his Council, the Parliament, or their agents. This is but a fragment of the diorama. What of the popularly elected assemblies in the colonies? Were they possessed of the tolerance of dissent that was so lacking in the common-law courts of the Crown? Regrettably, they were not. Borrowing from the manner of that mother of all legislatures, the Parliament,[3] the Virginia House of Burgesses in 1620 commenced the practice of punishing any criticism of the government, its procedures or its members, be it true or false.[4] Almost without exception, the other assemblies followed suit. The mold cast, prosecutions under the theory of criminal or seditious libel continued before state legislatures and courts without substantial abatement, at least until the adoption of the first amendment.[5] This background and climate gave rise to the blueprint of our democracy. To some, any amendment to the Constitution was unnecessary in that the Federal Government, as it was to be constituted, was powerless to abridge freedom of speech or of the press.[6] To them, to demand a guarantee of this nature was little

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[2] Roche, ***American Liberty: An Examination of the "Tradition" of Freedom,*** in ASPECTS OF LIBERTY 130 (M. Konvitz & C. Rossiter ed. 1958). Perhaps it is also a reflection of the legal doctrine of ***stare decisis.***

[3] ***See*** L. LEVY, LEGACY OF SUPPRESSION 16 (1960).

[4] ***See*** JOURNALS ***OF*** THE HOUSE OF BURGESSES OF VIRGINIA: 1619—1776 vol. 1619-1659, p. 15 (McIllwin ed. 1915).

[5] ***See generally*** L. LEVY, LEGACY OF SUPPRESSION 18-175 (1960), for an outstanding discussion of the colonial background to the first amendment's freedom of expression clause.

[6] ***See*** A. HAMILTON, THE FEDERALIST No. 84 (1945); 4 J. ELLIOT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 435, 453 (2d rev. ed. 1941).

more than a dangerous anti-Federalist tactic.[7] To others, it was a necessary protection against the evils of prior restraints which protection had, after arduous battle, become a part of English constitutional law.[8] But whether the first amendment was originally intended to do more than this, whether its protection was to have been absolute, is exceedingly doubtful.

"Congress shall make no law. . .abridging the freedom of speech, or of the press. . . ."[9] No other single clause of the Constitution has evoked such a torrent of scholarly (and some not so scholarly) comtemplation. On their face, it is astonishing that those unequivocal words could be subject to more than one interpretation. Yet there are scores. And how did the Nation's leaders of that era regard it? We know that many of the state constitutions of that time had similar guarantees,[10] but the states conducted trials for those who directed critical comment against either the state or the Federal Government.[11] We know also that federal courts very quickly discovered a body of federal criminal common law[12] that included the law of seditious libel.[13] Finally, we know of the Federal Sedition Act of 1798[14] which silenced criticisms of the fledgling Federal Government, despite the fact that it incorporated the requirements of the English Fox's Libel Act[15] that the seditious nature of the expression be determined by a jury of peers along with the general issue of guilt or innocence. This was the extent of the protection afforded citizens in the years immediately

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[7] *See* H. FORD, ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 289 (1892) ("Caesar" letters by Hamilton in October 1788).

[8] *See* F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476-1776, chs. 2-3, 6-12 (1952).

[9] U.S. CONST. amend. I.

[10] *E.g.* N.C. CONST. art. XXXIV (1776); S.C. CONST. art. XXXVIII (1778); N.Y. CONST art XXXVIII (1777); N.H. CONST. art. V, Bill of Rights (1784); MASS. CONST. art. II, Declaration of Rights (1780); GA. CONST. art. XVI (1777); MD. CONST. art. XXXIII, Declaration of Rights (1776). These articles which preserved the right of freedom of religion took care to exempt from this freedom any utterances deemed to be seditious. Consequently, it seems unlikely that the doctrine of seditious libel, so carefully reserved in one part of the state constitutions, would be rejected elsewhere. *See also* PA. CONST. art. IX, § 7 (1790); DEL. CONST. art. I, § 5 (1792).

[11] *See* L. LEVY, LEGACY OF SUPPRESSION 176-249 (1960).

[12] United States v. Worrall, 2 U.S. (2 Dall.) 384 (1793); United States v. Ravara, 2 U.S. (2 Dall.) 297 (1793); United States v. Smith, 27 F. Cas. 1147 (No. 16323) (C. C. Mass. 1792); 1 OPS. ATT'Y GEN. 71 (1797).

[13] *See* J. SMITH, FREEDOM'S LETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 188-220 (1956); F. WHARTON, STATE TRAILS OF THE UNITED STATES 476-79 (1849). Ultimately, however, in 1812, this view was laid to rest by United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32 (1812).

[14] Act of July 14, 1798, 1 Stat. 596.

[15] Fox's Libel Act of 1792, 32 Geo. 3, c. 60.

subsequent to the adoption of the first amendment.[16]

But what of it? For every opinion both from the Bench and from legal journals that professes a need to find the original intent of the framers,[17] one can find another opinion disclaiming the practice.[18] Jurists will vehemently deny that they have any power to legislate,[19] however, one need not read too many volumes of the reports of the Supreme Court since the early case of *Marbury v. Madison*[20] to realize that the power to construe, to interpret, and to declare unconstitutional is very nearly the power to legislate.

[16] Even Professor Meiklejohn, a vociferous libertarian who advocates the widest interpretation of the freedom of spech clause, observed that: "That amendment, then, we may take for granted, ***does not forbid the abridging of speech.*** But, at the same time, ***it does forbid the abridging of the freedom*** of ***speech."*** A. MEIKLEJOHN, POLITICAL FREEDOM **21 (1948)** (emphasis in original). He further observed that a well-ordered society requires the prohibition of certain ***forms*** of speech. Libel and slander and incitement to crime (which is itself a crime, he notes), and treason may be and must be forbidden and punished. "[I]n those cases, decisive repressive action by the government is imperative for the sake of the general welfare. All these necessities that speech be limited are recognized and provided under the Constitution. They were not unknown to the writers of the First Amendment." *Id.* Perhaps what Professor Meiklejohn intends to say is that speech per se may not be abridged, but that certain forms of speech which were punishable under the common law were also subject to be made punishable by Congress without offending the first amendment.

In **1897,** Justice Brown stated that: "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties [sic] and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputations. . . ." Robertson v. Baldwin, **165** U.S. **275, 281 (1897)** (dictum),

As late as **1907,** Justice Holmes described the state of the law as follows: "But even if we were to assume that freedom of speech and freedom of press were protected from abridgement on the part not only of the United States but also of the states, still we should be far from the conclusions that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is 'to prevent all such ***previous restraints*** upon publications as had been practiced by other governments,' and they do *not* prevent the subsequent punishment of such as may be deemed contrary to the public welfare. . . .The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all." Paterson v. Colorado, **205 U.S. 454, 462 (1907)** (dictum) (emphasis in original) (cites omitted).

[17] *See* Dred Scott v. Sandford, **60 U.S. (19** How.) **393 (1857).**

[18] *See* McCulloch v. Maryland, **17** U.S. **(4** Wheat.) **316 (1819).**

[19] *See* Osborn v. Bank of the United States, **22** U.S. **(9** Wheat.) **738 (1824).**

[20] 5 U.S. (1Cranch) **137 (1803).**

Where the very yardstick of constitutionality is itself expanded or contracted to conform with contemporary mores and standards, the exercise of the power is unmistakable.

In this posture, then, there would appear to be little justification to base any current interpretation of the Constitution on the original intent of the framers. What constituted wisdom six generations past, in a time in which Coke and Blackstone dominated legal thought, can provide but meager light in which to view what has subsequently developed into a cornerstone of individual liberty in the United States. Having seen the distant past, let us put it to one side and look to more recent times.

III. "FREE SPEECH" IN THE COURT

In former times, it has been said that the law moves slowly. There can be no better example than the progress in the area of free speech. Apart from the expiration of the Sedition Act of 1798[21] and the penitent repayment of fines imposed under its authority, there were no significant developments in the area of free speech for more than a century. Then, after the engine of Manifest Destiny had pushed our Nation's borders from the Atlantic to the Pacific and the last Indian tribe and Mexican outlaw had been subdued, for the first time the United States cast its gaze across the Atlantic and saw Europe smoldering and soon to erupt in a conflagration of social upheaval, armed revolution, and world war. At the same time, Americans of that period became aware of the importation into this country of ideologies which, in their estimation, posed a serious threat to the American, indeed the democratic, system of government.22 It is, consequently, not astonishing that this period saw the reintroduction of prosecutions for the expression of what the government deemed to be politically pernicious thought.23

Appeals frequently follow prosecutions of this nature and,

[21] Act of July 14, 1798, 1 Stat. 596. Statute expired by its own terms on March 3, 1801.

[22] It is not the purpose of the author to conduct a sociological study on the adsorption of the immigrant into American society. Suffice to say that a large portion of the immigrants of this period did not settle in rural areas of this country and consequently gradually take on American attitudes by the time American society passed judgment on them as a group. Instead, they were often crowded into ghettos in the major cities along the east coast and, being generally without substance or means and often being from parts of Europe rent with anarchy and communism, they immediately fell under the suspicious gaze of the older, established dmerican society. In individual cases, this suspicion may have been well founded. In others, however, it was not. *See* generally Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941).

[23] *Id.*

hence, we are given the case of Schenck *v.* United *States.*[24] Schenck and his colleagues were convicted of conspiring "to violate the Espionage Act of June 15, 1917, chap. 30, § 3, **40** Stat. 217, 219,. . .by causing and attempting to cause insubordination, etc., in the military and naval forces of the United States"[25] **by** circulating documents calculated to cause insubordination and obstruction to those called and accepted for military service. The case reached the Supreme Court on the issue of whether the Espionage Act, as it had been applied to the defendants, contravened the freedom of speech clause in the first amendment. Writing for the Court, Justice Holmes began by recalling his own dicta in Patterson *v. Colorado.*[26] He appeared, then, to withdraw slightly from his earlier position by conceding that: "*It* well ***may*** be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in Patterson v. Colorado. . . ."[27] For the Court, he admitted that in other places and during other times the defendants would have been within their constitutional rights to say what they did. Then, after giving his well-known examples of prohibitable speech — that of "falsely shouting fire in a theatre," and of "uttering words that may have all the effect of force"[28]— he set down his "clear and present danger" test of the circumstances required before utterances may be constitutionally punished as threatening to bring about the substantive evils that Congress has a right to prevent.[29] Essentially, then, what was done in this case was not rejection of the philosophy underlying the doctrine of seditious libel, but introduction of a judicially imposed minimum causal connection between an utterance and a congressionally declared evil. It will be remembered that under the theory of seditious libel a person could be punished after it was determined by a court, usually on an ad hoc basis, that the particular utterance charged was of a pernicious tendency and threatened the government or peace and good order. Hence, Congress had specifically determined that counseling or inducing insubordination and obstructing the recruitment and induction efforts of the government was dangerous and hence was to constitute a crime. As under early common law, however, it was left to the courts to determine whether particular

[24] **249** U.S. **47 (1919).**
[25] *Id.* at **48-49.**
[26] **205** U.S. **454, 462 (1907).**
[27] **249** U.S. at **51-52** (emphasis added).
[28] *Citing* Gompers v. **Buck's** Stove & Range Co., **221** U.S. **418, 439 (1911).**
[29] **249** U.S. at **52.**

conduct would achieve the prohibited result. Consequently, Justice Holmes' apparent concession quoted above could not, on the basis of this case, be said to amount to more than a holding that the first amendment protects against the prior restraint of most expressions and the consequent punishment of all but harmful utterances. One might indeed wonder what magic exists in the catch-words "clear and present danger" to give the opinion such stature in the first amendment field.

The theory did not change a week later when Justice Holmes, again writing for a unanimous Court, said:

> [T]he 1st Amendment, while prohibiting legislation against free speech ***as such,*** cannot have been, and obviously was not, intended to give immunity for every possible use of language We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.[30]

Concerning this specific case, he added:

> It might be that all this (allegedly seditious material) might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the country is at war.[31]

In the companion case of ***Debs v. United States"*** Holmes made use of the phrases "the natural and intended effect" and the "probable effect" of the allegedly seditious speech. He made no mention of his earlier and more stringent requirement for a "clear and present danger" that the prohibited evil would result. Consequently, this too found unanimous acceptance among his colleagues on the Court.

But when the application of the "clear and present danger" test would have affected the outcome of ***Abrams v. United States,"'*** Justice Holmes and Brandeis found themselves a minority of two. In reviewing the convictions of a number of almost comically inept Socialist agitators, seven members of the Court were of the opinion that acts done with the mere intent to impede the war effort were per se constitutionally punishable under the Espionage Act. Freed from the restraints imposed by writing a majority

[30] Frohwerk **v.** United States, 249 U.S. 204, 206 (1919) (emphasis added).

[31] *Id.* at 208. What he appears to really be saying, in light of his earlier opinions, is that we may condemn men or measures whether we are at war or not. But our utterances may not constitute a substantial threat to the state or we will be punished. Presumably, then, whether we are at war is a factor that may be considered in ascertaining the threatening nature of the speech or writing in question. Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissent in which Brandeis, J., concurred).

[32] 249 U.S. 211 (1919).

[33] 250 U.S. 616 (1919).

opinion which frequently represents compromise, Justice Holmes expressly rejected the idea that the theory of seditious libel survived the adoption of the first amendment in American jurisprudence.[34] While not conceptually astonishing coming from Holmes, it was contrary to his dicta in *Patterson v. Colorado.*[35] It is, however, possible to perceive in the remainder of his dissenting opinion the remnants of the doctrine that he rejected. He would still permit the suppression of those utterances that pose an immediate threat to the safety of the nation, and this is the essence of seditious libel in its uncorrupted form. The ideas that he would permit in his competitive market of ideas would still largely be innocuous, harmless, or so unlikely of acceptance as to pose no consequential threat.

The increasing divergence of Holmes and Brandeis from the majority of the Court on the requirement of a genuine causal connection between the language used by the defendants and a threat to the government or public order was illustrated in *Gitlow v. New York.*[36] There, the defendants were convicted in a state court of violating a statute which prohibited the advocacy of criminal anarchy. The statute defined criminal anarchy as advocating "that organized government should be overthrown by force or violence, or by assassination of the executive head or of the executive officials of government, or by any unlawful means."[37] A unanimous Court held that the fourteenth amendment included the principle of free speech. Seven members, however, were of the view that the states were constitutionally possessed of the power to condemn language which, in its reasonable legislative judgment, was deemed to constitute an incitement "to the overthrow of organized government by unlawful means." With respect to the reasonableness of the legislative judgment, Justice Sanford, speaking for the Court, saw no requirement for the state to wait until all doubts as to the inflammatory and dangerous character of a harangue are resolved by the crash of brickbats through state house windows. Citing *People v.* Lloyd,[38] he emphasized that to require a government to stay its hand until the danger of violent overthrow materializes could well result in a *fait accompli.* He went on to hold that the present statute was not unreasonable to achieve a legitimate state purpose and, consequently, did not unjustifiably encroach upon the freedom of

[34] *Id.* at 630 (Holmes, J., dissent in which Brandeis, J., concurred)
[35] 205 U.S. 454, 462 (1907).
[36] 268 U.S. 652 (1925).
[37] *Id.* at 654.
[38] 304 Ill. 23, 34, 136 N.E. 505, 530 (1922).

expression. As the statute was constitutional, all that remains for the courts to do is determine whether a specific utterance falls within the statutory proscription. Justice Sanford concluded by carefully distinguishing their rule in ***Schenck v United States.***[39] He asserted that the statute in ***Schenck*** merely prohibited certain acts and left it to the courts to determine as an original question whether particular language was, by "its natural tendency and probable effect," likely to result in the prohibited acts. That this distinction existed in the nature of the statutes is readily apparent. Equally apparent, however, is his misreading of Justice Holmes' dissent in ***Schenck.***

Justice Holmes, with Justice Brandeis concurring, rather pointedly reiterated his test that: "The question in every case is whether the words used are used in such circumstances and are of a nature as to create a clear and present danger that they will bring about the substantive evils that [the state] has a right to prevent."[40] He saw no need to draw a distinction in the nature of the statute, as Justice Sanford had done. Holmes would apply his test in all cases. With respect to the characterization of Gitlow's manifesto as an incitement, Holmes eloquently observed that:

> Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

But not every idea or expression of opinion is an incitement to commit what is, in fact, a criminal act. Not even Justice Holmes would sanction incitement to riot. After careful study, it becomes clear that what he intended was no more than an application of his test to the facts of the case before him. There can be little doubt as to the fervor of the defendants in this case in expressing their views. Likewise, the result the defendants in this case had intended, he would admit, may be proscribed by the state. What he found lacking, however, was the chance of success and, consequently, any real danger to the government or public order.

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[39] 249 U.S. 47 (1919)

[40] Gitlow v. New York. 268 U.S. 662, 672-73 (1925) (brackets in original).

[41] *Id.* at 673.

On this basis, he was unwilling to permit the simple characterization of an expression of an idea or opinion as an inciment to substitute for a separate finding of significant danger and causal connection with the expression alleged.

Two years later, in ***Whitney v. California,***[42] a unanimous Court sustained a conviction under the California Criminal Syndicalism statute. As in the ***Schenck*** case, however, the two wings of the Court did so for separate reasons. Mr. Justice Sanford, again speaking for seven members, cited ***Gitlow*** for the premise that a state may punish speech that ***tends*** "to incite to crime, disturb the public peace, or endanger the foundations of organized government "[43] Then, as in ***Gitlow,*** he held that the legislature could be statute, without being arbitrary or unreasonable, determine that a certain category of speech and action involved danger to the government and to public order.

Justice Brandeis, in characteristic eloquence, wrote a pithy concurring opinion in which he reiterated and somewhat refined the position he and Justice Holmes had maintained since ***Schenck.*** He began by admitting that speech is subject to restriction if it is "required in order to protect the state from destruction or from serious injury, political, economic or moral."[44] He then recalled that ***Schenck*** had held that such a restriction is not valid unless the speech "would produce, or is intended to produce a clear and imminent danger"[45] which the state may legitimately prevent. With good reason, he used the introductory word "See" before his citation to ***Schenck*** as support for this general proposition. Unlike ***Schenck,*** Brandeis in this case would permit the proscription of speech that was merely ***intended*** to produce a clear and present or imminent danger. With respect to the conclusiveness of the legislative judgment, Justice Brandeis would not foreclose the courts from inquiring into the reasonableness of the legislative finding that the condemned acts or speech constituted a danger. As an abstract principle, probably every member of the Court at that time would have subscribed to it. The difference lay in its application.

To review for a moment, Justice Sanford and his colleagues on the majority appear to have been of the view that the state could constitutionally declare a certain category of language to constitute a danger. This categorization, although aided by a strong

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[42] 274 U.S. 367 (1927).
[43] *Id.* at 371.
[44] *Id.* at 373.
[45] *Id.*

presumption of validity,[46] could be reviewed by the Court. The only other step remaining for the Court would be to determine whether the language in a particular case reasonably falls into the statutory definition without consideration of extrinsic circumstances. On the other hand, Holmes and Brandeis would, after determining the constitutionality of the statute, look to the language for which the defendant was convicted not to see if it merely fits the statutory formula, but to determine whether it, in its factual context and in the existing circumstances, actually could be deemed to constitute a danger to the government or to public order. Once again, it is a matter of causal connection between the language *in* the *case* and a substantial danger, not a class of language and a danger.

Continuing, Justice Brandeis gave his view of American history on the subject of freedom of speech punctuated by related statements of his philosophical position. Regrettably, he apparently saw no need to list any authority for his historical conclusions, many of which are contrary to those drawn in other works that are well documented. Moreover, his style of interspersing philosophy among statements of history gave the initial impression that those historical figures of whom he spoke were in accord with his views. These are but small criticisms, however, and little fault can be found with his basic notion of what the law in this area should be. Essentially, the notion included the clear and present danger requirement forged by Holmes. He sharpened the test, however, by requiring that the danger apprehended be so imminent that there is insufficient time to avert the evil by further education or discussion and that the evil or danger be so substantial as to justify the enforcement of silence. As if to chide Justice Holmes for his dissenting opinion in *Gitlow,* Brandeis admonished that: "The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind."[47] Finally, at the end of his opinion, Brandeis observed that there was sufficient testimony in the record to satisfy his test enumerated above. On this basis, he voted to sustain the convictions.

Slowly, quietly, the Court, without pausing to overrule the earlier "tendency" test, adopted the clear and present danger requirements as forged by Justice Holmes and honed by Justice Brandeis.[48] In seemingly effortless fashion, Justice Murphy, speaking for the majority in *Thornhill v. Alabama,*[49] laid down

[46] *See, e.g.,* Mugler v. Kansas, 123 U.S. 623 (1887).
[47] 274 U.S. at 376.
[48] *See* Herndon v. Lowry, 301 U.S. 242, 261-63 (1937)
[49] 310 U.S. 88 (1940).

the Holmes-Brandeis view as if it had been for all time an immutable truth. This was likewise the basis for voiding the conviction for common law breach of the peace in *Cantwell v. Connecticut.*[50] Such then was the state of things in 1940.

Thus far the Republic had defended against only the most rudimentary and crude forms of sedition. But the days of the wretched, wild-eyed communists, socialists, and anarchists distributing their shabby leaflets and ranting from soapboxes were, from that time forward, forever gone. With only a pause necessitated by World War II, various foreign powers set about carefully and clandestinely recruiting and indoctrinating an extensive organization which they hoped would ultimately become the vanguard for the forceful overthrow of the duly constituted government of this Nation.[51] This, coupled with the discovery of some actual espionage within the government, prompted renewed emphasis on all aspects of internal security. As soon as the ink dried on the recodification of the Smith Act, indictments were returned charging numerous members of the Communist Party, U.S.A., with violations of the conspiracy sections of that Act. One such case was ***Dennis v. United States.***[52] After a trial that lasted some nine months and produced a record of **16,000** pages, the defendants were convicted. Unsuccessful in their appeal to the United States Court of Appeals for the Second Circuit, they petitioned for and were granted certiorari to the Supreme Court on two questions: "(1) Whether either **§ 2** or § 3of the Smith Act, inherently or as construed and applied in the instant case, violates the First Amentment and other provisions of the Bill of Rights; (2) Whether either § 2 or § 3 of the Act [are void for **vagueness**]."[53]

With respect to the "freedom of speech" elements of the case, the Court, speaking through Chief Justice Vinson, observed that it is beyond cavil to doubt that Congress has the power to protect the government from overthrow by force and violence. Rather, the issue was whether the ***means*** chosen were permissible in light of the first amendment. The Court quickly dismissed the contention that the Act, by its terms, would prohibit even academic discussion of the merits of Marxism-Leninism. Such a result would constitute the antithesis of the idea and the purposes of free speech. In the exercise of the Court's duty to interpret federal legislation in a manner consistent with the Constitution, the chief

[50] **310** U.S. **296 (1940).**

[51] It should be noted at this point that we are not here concerned with the espionage or sabotage aspects of internal security. These are essentially ***acts*** and do not principally involve issues of freedom of expression.

[52] **341** U.S. **494 (1950).**

[53] *Id.* at **496-96.**

Justice noted that the language of the Act was "directed at advocacy, not discussion." And, in this connection, he stated his approval of the trial judge's charge to the jury that the statute did not proscribe the "peaceful studies and discussions or teaching and advocacy in the realm of ideas."[54] Moving on, he quickly summarized the holdings of *Schenck*, *Frohwerk*,[55] *Debs*,[56] *Abrams*,[57] *Schaefer*[58] and *Pierce*[59] and deduced that:

> [W]here an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only where the speech or publication created a "clear and present danger" of attempting or accomplishing the prohibited crime, e.g., interference with enlistment.[60]

The Chief Justice then considered the *Gitlow* and *Whitney* cases, which involved convictions under state statutes that had designated particular speech as criminal. He concluded that the essential difference between the approach taken by the majority and the Holmes-Brandeis minority in those cases was whether the defendent could show "that there was no danger that the substantive evil would be brought about."[61] While the majority opinions in those cases had never been expressly overruled, he expressed the view that subsequent opinions treating cases involving either state or federal statutes had gradually adopted the Holmes-Brandeis approach. He cited as an example the case of *American Communications Assoc. v. Douds*.[62]

Turning to the instant case, the Chief Justice held that the overthrow of the government by force and violence was a sufficiently substantial evil to justify Congressional limitation of speech provided, of course, that there is a clear and present danger that the speech will bring about the evil Congress seeks to prevent. He went further, however, in that he also found it an evil adequate for these purposes if a forceful overthrow were even attempted notwithstanding the fact that the likelihood of success is difficult of calculation. Continuing, he rejected "the contention that

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[54] *Id.* at 502.
[55] 249 U.S. 204 (1919).
[56] 249 U.S. 211 (1919).
[57] 250 U.S. 616 (1920).
[58] 251 U.S. 466 (1920).
[59] 252 U.S. 239 (1920).
[60] 241 U.S. at 505.
[61] *Id.* at 507. This conclusion by Chief Justice Vinson differs slightly in form from that of the author. See discussion at pp. 63-66 *supra*. It is the opinion of the author that what Justice Brandeis held was to permit the Court to itself apply the clear and present danger test to the language of the alleged pernicious language. This is essentially the same procedure that the Chief Justice discovered in the cases.
[62] 339 U.S. 382 (1950).

success or probability of success" is the criterion. But perhaps he went too far, for in the next breath he adopted the rule laid down by Judge Learned Hand in the court below. Said Justice Hand: "In each case [courts]must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[63] Thus, it appears that probability does play a part in the test, although it is not an exclusive test in itself.

In a lengthy concurring opinion, Justice Frankfurter took a different route to the same conclusion. His approach is especially significant in that it was later adopted by several other members of the Court as the basis for their "balancing of the interests'' position. After acknowledging that the case presented an exceedingly grave conflict of interests, he spurned any notion that it was capable of resolution by "a dogmatic preference for one or the other [interest], nor by a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict."@He expressed wariness of absolute rules for the further reason that they are inevitably eroded by exceptions. Casting a backward glance at Madison and Hamilton, he observed that the language of the first amendment is not 'tobe read as cold ink on a sheet of paper but rather what it was "in their minds which they had conveyed."[65] He went on to add that:

> Free speech is subject to prohibition of those abuses of expression which a civilized society may forbid. As in the case of every other provision of the Constitution that is not crystalized by the nature of its technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living

"Dennis v. United States, 183 F. 2d 201, 212 (2d Cir. 1950). The rule appeared in a slightly different form in a vastly different context some three years earlier. With the same apparent mathematical preciseness, Judge Hand set down his formula for determining the duty of the operator of a barge as follows: "[T]he owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that [the barge] will break away; (2) the gravity of the resulting injury, if [it] does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B [is less than] PL." United States v. Carroll Towing Co., 159 F. 2d 169, 173 (2d Cir. 1947). While it is somewhat disconcerting to compare the rights and duties of the government to safeguard peace and order and to protect against violent overthrow with the duties of a barge operator, we might designate the probability of success of the advocacy to result in harm P; the harm L; and the burden upon personal liberties B. So doing and applying Judge Hand's formula B [is less than] PL, we arrive at the test applied by the judge in this case and adopted by the Supreme Court.

[64] 341 U.S. at 519. See also Pennekamp v. Florida, 328 U.S. 331, 353 (1946) (Frankfurter, J., concurring).

[65] 341 U.S. at 523.

[65] Id.

instrument.[66]

Justice Frankfurter then submitted that the needs of the Nation's security and those of society's interest in the, protection of the freedom of speech are both best served by an "informed weighing of the competing interests, within the confines of the judicial process."[67] But, he asked:

> [H]ow are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—Who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a *good* reflex of a democratic society.[68]

In response, he states that after Congress has exercised the initial and primary responsibility for balancing the interest in these situations, the proper role of the courts is to set aside only the legislative judgment that has no reasonable basis. He would require that the statute be defmite, that procedures established under it satisfy the requirements of fundamental fairness, and that the judgment in a particular case be supported by substantial proof.

After cataloguing the significant cases of the Court that touched upon first amendment guarantees, Justice Frankfurter singled out for detailed. discussion those directly concerning prohibitions of speech that threatened the government or peace and order. His summary led to the conclusion that, generally, the results which were obtained in each of those cases, under the multitude of tests purportedly used, were the same that would have been obtained had the interests been balanced. He quoted with approval the conclusion of Mr. Freund that:

> The truth is that the clear-and-present-danger test is an oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those which the state has imposed: and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase "clear and present danger," or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle.[69]

[66] *Id.*
[67] *Id.* at 525.
[68] Id.
[69] S. FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1949),

Apparently not wishing to conclude that Holmes' famous formula was so oversimplified, Justice Frankfurter saw in its continued use the danger that it might be substituted for the critical analysis and careful and deliberate selection of values that the phrase itself once represented.

Concluding the construction of his "balancing" rule, Justice Frankfurter reminded that:

> Not every type of speech occupies the same position on the scale of values. There is no substantial public interest in permitting certain kinds of utterance: "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[70]

The Justice then remarked that notwithstanding the admitted ease with which protected explanation or discussion may merge into prohibitable advocacy or incitement, the distinction between them is valid and useful. Finally, putting his rule to use, he set out the interests objectively as he saw them. He examined the evidence in the case before him to determine if it furnished a substantial basis for the verdict. So finding, he continued on to take what amounted to judicial notice of various facts concerning world communism and communist activities in this Nation and in Canada. He briefly outlined considerations militating against the suppression of any expression and concluded, however, that it was within the pale of reasonableness for Congress, in its legislative judgment, to arrive at the determination that certain communist activities constituted a substantial threat. Furthermore, the method chosen by Congress was not an unreasonable means to protect against the threat. He did not end, however, before setting dowp his personal caveat as to the wisdom of such repressive measures.

Mr. Justice Jackson approached the problems presented in *Dennis* by outlining the birth and growth of communist power in

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quoted in Dennis v. United States, **341** U.S. **494, 542-43 (1950).**

In the same vein, Justice Frankfurter, in his concurring opinion in Pennekamp v. Florida, **328** U.S. **331, (1946),** said:

"'Clear and present danger' was never used by Mr. Justice Holmes to express a technical legal doctrine or to convey a formula for adjudicating cases. It was a literary phrase not to be distorted by being taken from its context. In its setting it served to indicate the importance of freedom of speech to a free society but also to emphasize that its exercise must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by our Constitution. When those other attributes of a democracy are threatened by speech the Constitution does not deny power to the States to curb it."

[70] Dennis v. United States, **341 U.S. 494, 544 (1950), *citing*** Chaplinsky **v.** New Hampshire, **315 U.S. 568, 572 (1942).**

Europe and by discussing the methods used to achieve this power. He observed that duplicity, sabotage, terrorism, assassination, and mob violence are all tools used at appropriate times by communists who attempt to secrete themselves in critical positions in government, in industry, and in the labor movement. It was not legislation prohibiting activities of this sort that the clear and present danger test of ***Schenck*** was intended to test. **As** did Justice Frankfurter, Justice Jackson thought the courts and the judicial process ill-equipped to determine when the requisite degree of serious danger and imminence had been reached to satisfy the Holmes test in this factual context. Then, he abruptly turned to discuss the law of conspiracy and found therein an adequate basis to permit Congress to punish a conspiracy to overthrow, even though the conspiracy is only evidenced in a particular case by oral or written communication. In brief, what he asserts is that the speech itself is not punished in such cases, but merely is evidence of, or constitutes a punishable overt act of, a conspiracy. Finally, like Justice Frankfurter, he expressed his personal doubts as to the wisdom and effectiveness of the "remedy" expounded by enactments such as the one under review.

There were two dissenting opinions in the case. Consistent with his earlier views, Justice Black was critical of what he considered to be attempts of the majority and concurring justices to sap the clear and present danger test of any remaining vitality. While the majority and concurring members conceded constitutional authority in the legislature to make reasonable forecasts of results of present conduct, Black decried the practice as reducing the first amendment to a mere "admonition to Congress." He would require retention of the clear and present danger test as the absolute "minimum compulsion to the Bill of Rights."[71] **As** a consequence, he would require demonstrable proof of a present danger rather than permit Congress to speculate as to a future one regardless of the reasonableness of their speculation.

Justice Douglas, in a somewhat lengthy dissent, viewed the indictments under the act as charging merely teaching the creed of violent overthrow of the government coupled with intent that it should, at a propitious time in the indefinite future, be put into action. He warned **of** the dire consequences that follow those who set out to punish not what is said or done, but merely "wrong thinking." What he mentioned, but did not discuss, is the fact that acts joined with a criminal intent of one sort or another often constitute a crime, whereas a similar act, if it is innocent, would

[71] *Id.* at **580** ***citing*** Bridges v. California, **314 U.S. 252, 263 (1941).**

not be unlawful. He merely stated that the first amendment gives speech a preferred status in the hierachy of acts and, impliedly, that speech alone cannot serve as the act required for a conspiracy. Justice Douglas's main theme was that freedom **of** speech was the rule, not the exception, and that it may only be halted when the conditions of the clear and present danger test are met. He quoted at length from Justice Brandeis's opinions in ***Whitney v. California,***[72] apparently adopting that view of the **matter.**[73] Finally, Justice Douglas was not prepared to take judicial notice of the ***domestic*** vitality and the resultant threat of the Communist Party. Conceding the relationship between international and domestic communist strength, he would require proof to the ***courts*** not merely to Congress, of the nature that would satisfy Holmes' famous test.

And how far had the Court gone in the three decades between ***Schenck*** and ***Dennis?*** Both the majority and the concurring opinions in ***Dennis*** profess to adhere to the clear and present danger rule though, admittedly, Justice Frankfurter would prefer not to express it as such. As outlined in the discussion of the case, he was troubled that the all-too-free use of the term had grown to substitute for the balancing that the term had originally represented. The dissenting opinions, also invoking the magic of "clear and present danger," would not accept, on faith, the legislative judgment. While the majority was satisfied as to the reasonable foundation for the legislative findings of danger, the dissenting justices, viewing freedom of expression a liberty of the greatest dimension indispensable to democratic society, would require proof of equally high order shown to the courts. The similarities between the positions of the wings of the Court in the ***Gitlow*** and ***Whitney*** cases with those in ***Dennis*** are at once apparent. The dilemma was the same, as were the solutions. The majority, recognizing the difficulties in furnishing the proof required by the minority, was willing, in view of the magnitude of the potential harm, to settle for less in the way **of** such proof. The minority, though it may not have been articulated in each opinion, started from the presumption that the framers of the Constitution intended to give freedom of expression a preferred position of such great weight that only the imminence of grave public danger would offset it as to allow restriction. Singling out the phrase "preferred position" for criticism, Justices Frankfurter and Jack-

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[72] **274** U.S. 357, 376-77 **(1927).**

[73] See text accompanying note **47** *supra.*

[74] ***Accord,*** Brinegar v. United States, **338** U.S. **160,** 180 **(1949)** ; Kovacs v. Cooper, **336** U.S. 77, **88 (1949).**

son have argued that no one constitutional right can have a preferred position over any other.[74] But neither they nor their brothers who joined them in their opinion take freedom of expression lightly." Hence, it is indeed unfortunate that so many opinions concentrate on this relatively petty diversity of viewpoint when the real problem is a difference in reading the balance of interest after the appropriately weighed values have been placed in the opposing pans.[76] Thus stated, the authority under the Constitution to limit speech still bears remarkable resemblance to the doctrine of seditious libel." The only unexpressed factor in the definition of seditious libel is the countervailing influence of the notion of freedom of expression. Nevertheless, Englishmen in England at the time of our independence enjoyed, at least in theory, such a liberty.

To this point, anti-sedition and subversion cases comprised the bulk of the first amendment work of the Supreme Court. But in the latter part of the 1940's there was introduced the first of the Negro civil rights cases. With increased frequency, members of Negro organizations in the south were prosecuted under sedition statutes for advocacy of the overthrow of state and local governments by force and violence, and for contempt as a result of refusal to produce membership rolls. During the same period, loyalty oaths became popular among the states and a number of challenges to them reached the Court. Then, too, in the view of federal and state legislators, the minds and morals of the country were under attack by a wave of obscenity and pornography. Criminal prosecutions resulted from renewed emphasis being placed on

[75] "Free discussion of the problems of society is a cardinal principle of Americanism — a principle which all are zealous to preserve." Pennekamp v. Florida, 328 U.S. 331, 346 (1946) (Frankfurter, J., concurring) (footnote omitted).

"There may be an analogy in a person asking, "What will it cost?" One person may reply, "Twenty-five cents." A second would say, "A quarter." The value of the price in each case is identical though differently expressed. With respect to freedom of expression, the essential difference between what have come to be described as the "balancing" and the ('absolutist" wings is not in the weight each would give the first amendment, but how much weight should be given to the asserted need of the government to restrict expression.

[77] While there can be no doubt that the doctrine has suffered much abuse and misapplication, in its pure form seditious libel is defined as: "A written or printed document containing seditious matter or published with a seditious intention, the latter term being defined as 'an intention to bring into hatred or contempt, or to excite disaffection against, the king or the government and constitution as by law established, or either house of parliament, or the administration of justice, or to excite British subjects to attempt otherwise than by lawful means the alternation of any matter in church or state by law established, or to promote feelings of ill will and hostility between different classes." BLACK'S LAW DICTIONARY 1523 (4th ed. 1951). *See also* Dennis v. United States, 341 U.S. 494, 561-78 (1951) (Jackson Jr.).

keeping such material out of the mail and off the book racks. Therefore, a few cases of this nature reached the Court and review was granted. From this, it becomes at once apparent that the Court was moving into areas that, for one reason or another, had never seen much Court activity. A majority of earlier cases concerned direct punishment for speech. The more recent cases, however, have forced the Court to come to grips with less direct sanctions than imprisonment or fine, with situations in which the proscription is primarily directed at something other than speech with only an incidental limitation of expression, and with forms of expression of exceedingly doubtful social utility. Where there had always been one current prevailing philosophy as to when governmental intrusion was constitutionally permitted in the area of free expression, now there appear to be scores. Where there had been unanimity in opinions with perhaps an occasional dissent, now there may be four or five or more opinions no one of which commands the vote of the majority. But, notwithstanding intervening changes in Court membership, the two apparently diverse positions established by Justices Frankfurter and Douglas in *Dennis* remain those which have divided the Court since that time.

In the unceasing quest to discover a rule from the morass of verbalism that characterizes this body of law, it has been blandly suggested that if the statutory restriction was principally intended to operate only indirectly on speech, the first amendment is not available to void the statute. While the outcome of the majority of the cases may suggest such an unspoken rule, there is little to recommend it. The Supreme Court has been constant in its alertness to detect and condemn any infringement — direct or indirect — of other constitutionally protected rights.[78] There is nothing in any of the opinions of the Court to indicate that it would exercise less diligence in the case of the first amendment. But while the commentator erred in his inductive reasoning, his observation that indirect infringement is often sustained is valid. On the thesis already set out that both wings of the Court engage in what is essentially a balancing of interests, the more remote the infringement, the less that will be required to be demonstrated as proof of a danger, the less danger that will be required, and the less the likelihood that it will occur need be demonstrated. This, it is submitted, is the real basis for the difference in outcome of the indirect infringement cases from those involving direct infringement.

[78] See Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964); Mapp v. Ohio, 367 U.S. 643 (1961).

Use of the same balancing procedure can be demonstrated in those cases passing upon the constitutionality of state and federal statutes limiting the political activities of public servants," in cases dealing with purportedly obscene material," and in a recent libel case wherein the defendant was a newspaper or news service.[81]

IV. VARIATIONS ON A MARTIAL THEME

In the introduction, there was inquiry concerning those in our military service who would dissent. Not too many years ago if one were to have asked a military officer whether the Bill of Rights applies to the services, he would most probably have replied with a curt, "Certainly not!" The same question today, however, would probably provoke a bewildered, "I don't know." Whether this is an exasperated reaction to imagined overuse of the Bill of Rights in recent civilian judicial decisions or the product of a more highly educated officer is not material to the discussion. The fact remains that the officer of today is becoming increasingly aware that there is an enormous body of law to which he, as an individual, is subject and an even larger body to which the services themselves are subject. But after becoming aware that his official actions are governed by law, the modern officer wants to know just what is the law with respect to freedom of speech. In short, can the government abridge the freedom of speech of those in the military service?

The simplistic approach would merely find that, although Congress is empowered "[t]o make Rules for the Government and Regulation of the land and naval Forces," all laws and regulations made under this authority must conform to the first amendment, It could be stated, in the manner of James Madison, that for Congress to pass any law abridging the freedom of speech—even one for the regulation of the military service—is beyond its powers. The Supreme Court, however, has not interpreted this literally but, as has been demonstrated, has found it necessary to resort to "balancing" to determine what speech may constitutionally be restricted.

Is this all there is to it? Is then the first amendment applicable

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[79] United Public Workers v. Mitchell, 330 U.S. 75 (1947). *Contra, Ex parte* Curtis, 106 U.S. 371 (1882).

[80] Jacobellis v. Ohio, 373 U.S. 184 (1964); Manual Enterprises v. Day, 370 U.S. 478 (1962); Roth v. United States, 354 U.S. 476 (1957).

[81] New York Times v. Sullivan, 376 U.S. 254 (1964). Other cases illustrating the "balancing of interests" approach are: Communist Party v. Subversive Activities Control Bd.. 367 U.S. 1 (1961); In re Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961); Uphaus v. Wyman, 360 U.S. 72 (1959).

to the military service? The constitutional law scholar would search the reports of the Supreme Court in vain to find a case on point. The Court and some of its members have indicated, however, that a citizen does not automatically surrender all of his constitutional rights when he dons a military uniform.[82] Some rights by their own terms would not be applicable. The remainder, according to the Court of Military Appeals, may or may not be. The members of this latter court have individually stated on numerous occasions that the citizen does not lose the protection of the Bill of Rights when he enters military service.[83] Chief Judge Quinn has taken the position that "service personnel 'are entitled to all the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself.' "[84] Judge Ferguson of that same court set down almost precisely the same rule in *United States v. Jacoby.*[85] Agreeing that servicemen do enjoy the protections of the Bill of Rights, Judge Kilday felt compelled to search back in our early history and in the then contemporary British court-martial practice to determine what the framers intended to include in the Bill of Rights as it was to apply to servicemen.[86] Judges Quinn and Ferguson, then, appear to accept as a starting point the current interpretation of the Bill of Rights and would, by balancing, determine whether the first amendment is not incongruous with the elemental necessities of the military community as it is to be applied in the case before them. Judge Kilday, on the other hand, would formulate his own "Military" Bill of Rights based upon what he interprets to have been the intent of the framers.

Admittedly, these positions of the members of the Court of Military Appeals were drawn in connection with primarily such

"*See* Burns v. Wilson, **346** U.S. **137 (1953)**; Wade v. Hunter, **336** U.S. **684 (1949);** Warren, *The Bill* of *Rights and the Military,* **37** N.Y.U.L. REV. **181 (1962).**

[83] *See* United States **v.** Wysong, **9** U.S.C.M.A. **249, 26** C.M.R. **29** (1958), where Judge Ferguson, with whom Judges Quinn and Latimer concurred, assumed without discussion that the accused enjoyed freedom of speech.

[84] United States v. Culp, **14** U.S.C.M.A. **199, 216-17, 33** C.M.R. **411, 428-29 (1963)** (concurring opinion). *See* United States v. Voorhees, **4** U.S.C.M.A. **509, 16** C.M.R. **83 (1954);** United States v. Sutton, **3** U.S.C.M.A. **220, 11** C.M.R. **220 (1953)** (dissenting opinion) ; Quinn, *The United States Court of Military Appeals and Individual Rights in the Military Service,* **35** NOTRE **DAME LAW. 491 (1960)** ; Quinn, *The United States Court of Military Appeals and Military Due Process,* **35 ST.** JOHN'S L. REV. **225 (1961).**

[85] 11 U.S.C.M.A. **428, 29** C.M.R. **244** (1960), *citing* Burns v. Wilson, **346** U.S. **137 (1953);** Shapiro v. United States, **69** F. Supp. **205 (1947);** and United States v. Hiatt, **141** F. 2d **664** (3d Cir. **1944).** *See also* United States v. Crawford, **15** U.S.C.M.A. **31, 49-59, 35** C.M.R. **3, 21-31 (1964)** (dissent).

[86] *See* United States v. Culp, **14** U.S.C.M.A. **199, 33** C.M.R. **411 (1963).**

procedural questions as right to counsel. However, there is no reason that their methods should not be applied as well to matters of substantive law. On this basis, Judges Quinn and Ferguson would most probably balance the soldier's right to freedom of speech, which by this postulate he enjoys in the first instance, against the needs of the country as represented by the military service. This, it is submitted, is precisely the approach of the Supreme Court in civilian cases involving freedom of speech. Conversely, application of the approach of Judge Kilday would lead to the conclusion that the government may, in almost every case, restrict the speech of its servicemen through the military departments. This conclusion is founded upon an examination of many of the same sources as were used by Judge Kilday in the *Culp* case,[87] which depict the strictest regimen both with respect to conduct and to expression. But, just as the civilian constitutional right to freedom of expression has broadened from Revolutionary days, so should the military right, unbridled by Congressional dilatoriness. Indeed, Congress does have the exclusive authority to prescribe rules for the regulation of the land and naval forces. Nevertheless, this does not place those rules above constitutional scrutiny by the courts just as they have examined time and again statutes in other areas of federal legislative jurisdiction.

If courts do act, what test should be applied? The requirements of the military may be vastly different from that of civilian society. Officers of every rank should be able to depend upon the fact that their subordinates will perform their duties quickly, fully, and with the utmost of loyalty. And subordinates, to do so, must maintain confidence in the ability, integrity, and the reciprocal loyalty of their superiors. The whole fabric of American society must be able to rely upon the loyalty and the competence of its military guardians to safeguard it from foreign military adventures." An army or a navy rife with seditious muttering, with internal dissention and disorder, constitutes a hazard with perhaps as great a potential for danger to this country as a hostile foreign army. For according to Blackstone, "he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier."[89] Unless we would deny a soldier the liberty that he

[87] *Id.*

[88] *See* United States v. Voorhees, 4 U.S.C.M.A. 509, 531-44, 16 C.M.R. 83, 105-18 (1954.; *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services,* 81st Cong., 1st Sess. 779, 816 (1949); *Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Senate Committee on Armed Services,* 81st Cong., 1st Sess. 176, (1949).

[89] 1 W. BLACKSTONE, COMMENTARIES 408 (Wendall ed. 1852).

defends there materializes a dilemma closely akin to its civilian cousin. I submit that it may be resolved in exactly the same manner.

Factors in an equation or elements in a formula, the liberty of an individual in uniform must be assigned a value, a high value, and the interests and needs which cannot be satisfied in any other manner set off in the balance against it. As is necessary with testing any statute upon a constitutional challenge, those laws and implementing regulations which result in restricting the freedom must first be found to be directed against a reasonably apprehended substantial evil against which Congress has a right to protect. The statute or regulation must be reasonable in the manner in which it would avoid the evil. And, with respect to a particular case, the conduct of the individual defendent must be reasonably apprehended to produce the same substantive evil. The test, then, is comprised of a general test of the statute and a particularized test of the law as it is applied to the individual.

V. CONCLUSION

Does, then, a member of the Armed Forces have the right to criticize or even disparage before a public gathering our foreign and domestic policies? Does a soldier have a right to carry a placard or banner and join in demonstrations against our conduct of a war? Can he, under the protective mantle of the first amendment, publish whatever he pleases? It depends. It depends upon many factors just as it would in the case of his civilian brethren. What appears certain, however, is that those considerations that support any program of enforced silence must be demonstrated to the satisfaction of the courts to overbalance the established,right of the soldier-citizen to freedom of expression.

A court testing the constitutionality of any such program must ask itself "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[90] But mindful of Justice Frankfurter's warning against the mechanical application of a dulcet formula, the court must never fail to add into the difficult equation the apples and oranges and pears representing the factors of dissimilar essence that must be weighed against one another.

If the prohibition is expressed in nonspeech or nonpress terms—that is, if it is directed against a harmful result rather than specific words—the government in any punitive proceeding bears

[90] Dennis v. United States, **341 U.S. 494, 510 (1950).**

the added burden to prove beyond a reasonable doubt that "the speech or publication created a 'clear and present danger' of attempting or accomplishing the prohibited [result]."[91]

The application of these tests compelled by the interpretation of the Constitution by the Supreme Court and the Court of Military Appeals will spell the doom of neither discipline and order nor the unfettered freedom of men and women in uniform. Just as the flexibility of these tests permits the reconciliation of individual freedom with the needs of civilian society, so also it affords a similar reconciliation of the respective needs of the military service and the soldier.

Whatever in the nature of waiver[92] may have been argued in times past when the military establishment was a small group of volunteers cannot be heard today when more than three million citizens, many of whom were conscripted, presently serve under arms. Also, arguments based upon necessity lose their force in the face of the constitutional application of this fundamental freedom as developed by the courts.

There can be no doubt. The freedom of speech clause of the first amendment extends as his birthright to protect him who "makes himself for a while a soldier."[93]

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[91] *Id.* at 505.

[92] Most servicemen, particularly those who had volunteered, have heard, at one time or another, the lamentable assertion that they "voluntarily" relinquished their constitutional rights when they entered the service. In any case, the argument continues, it is a situation that only affects a few citizens.

[93] 1 W. BLACKSTONE, COMMENTARIES 408 (Wendall ed. 1852).

COMMENT

THE COURT-MARTIAL AS A SENTENCING AGENCY: MILESTONE OR MILLSTONE*

I. INTRODUCTION

As the trial counsel completed his reading of the personal data concerning the accused and the defense counsel arose to present matters in extenuation and mitigation, Colonel Slade sighed inwardly and leaned back in his chair. How many times had he been through this procedure since being appointed president of the court? He could almost outline the story which would be laid before the court — the accused is from a broken home; his father had deserted the family during the accused's infancy: he had dropped out of high school to join the Army and then found the military regimen distasteful to his undisciplined nature. Why do they bother? Should defense counsel attempt to convince mature men that these convicted criminals are the unfortunate products of society and, therefore, are deserving of preferential treatment over the thousands of young soldiers who serve their country honorably? Is it proper for the defense counsel to waste the time of this group of key personnel with stories of mother complexes and character disorders when there is just not enough time to prepare those other thousands for the monumental tasks which confront them?

Colonel Slade's hand moved idly to the note pad before him — DD, 3 yrs., TF, E-1 — and consciously forced his mind to the brigade exercise only three days away.

Lieutenant Colonel Duncan tapped his pencil absently and reflected on the sad level to which the Army courts-martial system had descended. He still smarted inwardly from the rebuke of the law officer during the initial presentation of the case. A court-martial member is now relegated to a silent partner who must listen to evasive witnesses and high flown legal arguments of counsel without venturing to attempt to cut through all of the niceties and get to the real meat of the matter. Defense counsel was allowed to shield and protect, evade and maneuver, but woe be to the court member who attempts to nail him down — that pompous law officer would acidly attack every effort at simp-

* This comment was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Fifteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

lification and clarification, leaving only a passive role for the former key figures of military justice.

Major Severin glanced down the line of officers flanked on either side of him — the pink-cheeked lieutenant, two young captains, bored colonels — what a collection of people to determine the fate of this pitiful kid facing them now. Probably not one of them know what the whole system was about, and it was obvious that some could not care less. He felt superior to this group, as he had gained insight into the courts-martial system by virtue of his tenure on the court. How many others were aware that charges would not even have been brought had there not been a virtual finding of guilt at the article 32 investigation, which probably included a flunked lie detector test that evidentiary rules prohibited introducing. How many knew about "the deal"? This guy had probably been charged with rape originally, and then a deal had been arranged with the convening authority to reduce the charge to indecent acts with a minor. Also, the convening authority undoubtedly had made a deal on the sentence. Yet the court would struggle and fight over the sentence as they had over the findings, only to find that the question was moot and that the accused was "laughing up his sleeve" at the whole procedure.

Major Farwell had mixed feelings as he looked at the accused. He certainly had not been a shining example of a soldier, but this was certainly a "bum rap" for anyone to go to prison on. The girl had reminded him of his ex-wife — young, but full blown and saucy, obviously the type to tease and torment a man until he was not responsible for his actions. Well, even though you vote for a finding of not guilty, you must vote for a sentence. Could he hope to push through only a forfeiture and reduction?

Captain Mirson could not help but frown as the defense counsel asked for leniency for the accused. There are so many people working for leniency for "punks" that "Uncle Sam" is lost in the shuffle. You put a man in confinement and the stockade people let him out before you can turn in his equipment. If you want them to stay away for any length of time, you have to vote for the maximum period.

Lieutenant Freeham dreaded the thought of the closed session for sentencing. He thought he had raised a good point during the findings, but the reaction of Colonel Slade was startling to say the least. Of course, the Colonel had attempted to temper his comment by saying that everyone was entitled to express his opinion, but Lieutenant Freeham had been reluctant to press the point. After all, when you have only been in the Army for eight months,

you have to realize that the "old pros" know their way around considerably better. Just to be on the safe side, maybe it would be better to attempt to feel out the opinions of Colonel Slade on the sentence before saying too much.

Out of this welter of prejudice, misinformation, and antipathy is born a court-martial sentence — "fair and impartial" determination of the future of a military offender. Is this the best system the Army can provide to deal with its criminals? Is there a need for modernization and improvement of the sentencing procedures? The determination of the latter question is the purpose of this comment.

II. HISTORY OF THE COURTS-MARTIAL SENTENCING PROCEDURE

The substance of the original American Articles of War, adopted in Congress by resolution on June 30, 1775, has been traced to the Code of Gustavus Adolphus of 1621 and to the British Articles of 1774.[1] One need only look to a few provisions of the original American Articles of War to observe the beginning of the Army practice of sentencing by the members of the court[2] — a practice that has been preserved in each subsequent enactment of the Articles of War and in our modern day ***Uniform Code of Military Justice.***[3] Thus, the military legal system, along with thirteen states,[4] has elected to retain a system of jury sentencing, while the remaining thirty-seven states and the Federal Government have vested sentencing authority in the presiding judge. The advisability of the retention of jury sentencing, either in the states or in the military, is open to question in view of the recent comment of Justice Stewart of the Supreme Court:

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[1] *See* G. DAVIS, A. TREATISE OF THE MILITARY LAW OF THE UNITED STATES 340-41 (3d rev. ed. 1913).

[2] *E.g.*, article IV, which provides: "Any officer or soldier, who shall behave himself with contempt or disrespect towards the general or generals, or commanders in chief of the continental forces, or shall speak false words, tending to his or their hurt or dishonor, shall be punished according to the nature of his offense by the judgment of a general court-martial."

[3] *Uniform Code* of *Military Justice* art. 18 [hereafter called the Code and cited as UCMJ].

[4] Ala. code tit. 14, §§ 318, 322, 336, 395, 415, 424 (1959); Ark Stat. Ann. § 43-2306 (1963); Ga. Code Ann. § 27-2502 (1953); Ind. Ann. Stat. § 9-1819 (1956); Miss. Code Ann. §§ 2359, 2361 (Supp. 1964); Mo. Ann. Stat. § 546.410 (1953); Mont. Rev. Codes Ann. § 94-7411 (1949); N.D. Cent. Code § 12-06-05 (1960); Okla. Stat. Ann. tit. 22, § 926 (1958); Tenn. Code Ann. § 40-2707 (1955); Tex. Code Crim. Proc. art. 37.07 (1966); Va. Code Ann. §§ 18.1-9, 19.1-291-292 (1960); Ky. R. Crim. P. 9.84 (1966).

> It seems to me that, despite the Court's disclaimer, much of the reasoning in its opinion serves to cast grave constitutional doubt upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense. Though I have serious questions about the wisdom of that practice, its constitutionality is quite a different matter.[5]

While it may be argued logically that a court-martial sentencing system which has endured in this country for almost two centuries alone must have some merit, it can also be forcefully argued that the military has remained steadfastly devoted to the system on the basis of tradition alone, without regard to its obvious archaic nature. Neither argument is wholly correct. The plain fact is that in the infancy of the Army courts-martial system, sentencing by the court members was a necessity because of an almost total lack of legally trained personnel.6 It is axiomatic, however, that once the necessity for substitute procedures is eliminated, the procedure should likewise be eliminated. The size and recognized effectiveness of the modern day judge Advocate General's Corps now portends that the time has come to leave the law to the lawyers.

111. DEFECTS OF THE EXISTING SYSTEM

Preliminary to recommending sweeping changes in the courts-martial sentencing procedures, it seems necessary to enumerate what the author believes are the specific defects in the existing procedure which brand it as archaic and outmoded.

A. *SENTENCE* BY LAYMEN

First and foremost among the suggested deficiencies in the present sentencing system is the fact that laymen are called upon to perform a function which veteran jurists admit they find to be one of the most vexing problmes in the criminal law today.[7] Yet, these laymen are charged with the awesome responsibility of dealing with the life of another in the most profound way, with little guidance save their own conscience and the table of maximum punishments.*

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[5] Giaccio v. Pennsylvania, 382 U.S. 339, 405 (1966).

[6] *See* Fratcher, *History of the Judge Advocate General's Corps, United States Army*, 1 MIL. L. REV. 89 (1959).

[7] *See* ADVISORY COUNCIL OF JUDGES OF THE NATIONAL PROBATION AND PAROLE ASSOCIATION, GUIDES FOR SENTENCING (1957). Additionally, for an interesting discussion of the problems encountered by federal court judges in performance of the sentencing function, see Judges Go Back to School, N.Y. Times, 6 Nov. 1966 (Magazine), at 36.

[8] *Manual for Courts-Martial, United States, 1951*, ¶ 127c [hereafter called the Manual and cited as MCM]. The Court of Military Appeals has recently

B. INADEQUATE PRESENTENCE PROCEDURES

The great contributor to keeping the court uninformed in their determination of an appropriate sentence is the stilted, legalistic presentencing procedures currently practiced before courts-martial.[9] To do justice to both parties in the sentencing procedure of a criminal action, the person or persons charged with sentencing responsibility should be provided a clear, composite picture of the convicted person who is to receive their judgment. Therefore, the modern philosophy of fitting the punishment to the offender rather than the crime demands that the sentencing agency not be restricted to the formalistic requirements of trial procedure in gathering information to assist it in determining an appropriate punishment.[10] Nevertheless, under the current sentencing procedure, the Government may only introduce evidence of prior offenses which have resulted in final conviction by courts-martial,[11] and which were committed during "a current enlistment, volun- or obligation for service of the accused, and during the three years next preceding the commission of any offense of which the accused stands convicted."[12] Despite the fact that it may be highly relevant
to the proper disposition of the offender, the government is precluded from introducing evidence of military convictions other than those specifically sanctioned. Civilian convictions, nonjudicial punishment, administrative actions, and similar matters which could grant a full insight into the character of the accused and his service to the military are systematically excluded. In practice these exclusionary rules frequently create gross injustices. The offender assigned to a command in which summary or special courts-martial are used to punish for relatively minor offenses will be dealt with far more seriously at a subsequent court-martial than will the soldier whose past indiscretions have been concealed from the sentencing authority by virtue of his having been punished under article 15 of the Code. Furthermore, the soldier whose civilian conviction record clearly categorizes him as a chronic offender may be allowed to remain in the Army

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indicated an awareness of the inadequate guidance provided court members in the exercise of their sentencing function. In a series of cases beginning with United States v. Wheeler, 17 U.S.C.M.A. 274, 38 C.M.R. 72 (1968), the Court has required law officers to provide adequate guideposts for the adjudgment of an appropriate sentence.

[9] See MCM ¶ 76.

[10] *See* State v. Pope, 257 N.C. 326, 333, 126 S.E.2d 126, 133 (1962).

[11] UCMJ art. 44(*b*).

[12] MCM ¶ 75*b*(2).

to repeat his offense or commit more serious offenses by a court "shooting blind," unaware of his true character and rehabilitation potential.

There are clearly announced reasons for limiting evidence of prior misconduct of the accused prior to findings: (a) the involvement of collateral issues, (b) the fear that the court might find the accused had an evil disposition and infer from that that he committed the acts charged.13 Neither of these reasons are applicable to presentence proceedings, however, as these matters are not collateral to the determination of appropriate punishment. Also, the accused's disposition is both relevant and material in setting punishment. Why should it be excluded? Apparently, in the author's opinion, the possibility that previous misconduct will be given undue weight by a sentencing body of laymen is too great. Accordingly, the interests of justice have been warped to fit the vehicle which is to serve it rather than shaping the vehicle to the ends of justice.

The current sentencing procedure also acts to limit the effectiveness of counsel. Although the defense counsel must effectively present the merits of his client,[14] he is frequently reduced to spouting a stream of tired cliches and introducing innocuous evidence in mitigation lest he mistakenly open an area which the trial counsel could exploit to show the true character of the accused, so well hidden behind the exclusionary rules.[15] Also, the trial counsel must be conservative or risk the charge of over zealousness in the Government's cause.[16]

All too often, under current sentencing procedures the facts are stifled and the court-martial is presented an incomplete, if not actually inaccurate, picture of the man whose future it must determine.

C. INSTRUCTIONS ON SENTENCE

Another troublesome area in the present sentencing procedure lies in the law officer's instructions on sentence. While an in depth discussion of this problem is beyond the scope of this writing, it is

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[13] *See* United States v. Haimson, 5 U.S.C.M.A. 208, 17 C.M.R. 208 (1954).

[14] *See* United States v. Broy, 14 U.S.C.M.A. 419, 34 C.M.R. 199 (1964; United States v. Rose, 12 U.S.C.M.A. 400, 30 C.M.R. 400 (1961); United States v. Allen, 8 U.S.C.M.A. 504, C.M.R. 8 (1957).

[15] *See* CM 409344, McKinny, 34 C.M.R. 497, *petition for rehearing denied, 14 U.S.C.M.A. 685, 34 C.M.R. 480 (1964)*; *United States v. William, 8 U.S.C.M.A. 552, 25 C.M.R. 56 (1957).*

[16] *See* United States v. Anderson, 8 U.S.C.M.A. 603, 25 C.M.R. 107 (1958); United States v. Olson, 7 U.S.C.M.A. 242, 22 C.M.R. 32 (1956).

by no means an overstatement to say that the duties of the law officer in this area have been both complicated and burdensome. There is no requirement in the Code that the law officer instruct the court members on the sentence. The authority for the procedure apparently was originally derived from a loosely worded statement in the Manual that the law officer may advise "[the court] of the maximum punishment which may be adjudged for each of the offenses of which the accused has been found guilty."[17] Subsequently, the Court of Military Appeals removed the permissive aspect of the function by ruling in *United States v. Turner*[18] that the law officer is required to instruct on the maximum permissible punishment sua sponte. This holding set the stage for a barrage of rulings by boards of review and the Court of Military Appeals which, it seems to the author, confused even the most capable law officers. The law officer has been variously advised and admonished with respect to instructions on sentence that — instructions on the maximum punishment must include the possible additional punishment of reduction or the latter portion of a sentence will be disapproved;[19] he may not specifically refer to the several matters set forth in the Manual which the court "should" consider in determining the amount and kind of punishment to impose:" he may advise that a guilty plea is a matter in mitigation,[21] but may refuse an instruction that a guilty plea may constitute a step toward rehabilitation;[22] he, if requested, should give the collateral effects of a punitive discharge;[23] but no instruction should be given on the relative severity of two or more combinations of punishment;[24] the members of the court must be provided proper guidance by the law officer on sentencing procedures;[25] it is not error for the law officer to fail to instruct sua sponte on the procedure to be followed in voting on a sentence, provided no inquiries or contentions have raised questions of procedure which must be clarified;[26] and it is prejudicial to fail to

"MCM ¶ 76*b*(1). In defining the duties of the law officer, MCM ¶ 39b states that he "should" inform the court of the maximum punishment.

[18] 9 U.S.C.M.A. 124, 25 C.M.R. 386 (1958).

[19] *See* United States v. Crawford, 12 U.S.C.M.A. 203, 30 C.M.R. 203 (1961).

[20] *See* United' States v. Mamaluy, 10 U.S.C.M.A. 102, 27 C.M.R. 176 (1959).

[21] *See* United States v. Mamaluy, 10 U.S.C.M.A. 102, 105, 27 C.M.R. 176, 179 (1959).

[22] *See* United States v. Babers, 11 U.S.C.M.A. 163, 28 C.M.R. 387 (1960).

[23] *Cf.* United States v. Quesinberry, 12 U.S.C.M.A. 609, 31 C.M.R. 195 (1962).

[24] *See* United States v. Smith, 12 U.S.C.M.A. 595, 31 C.M.R. 181 (1961).

[25] *See* United States v. Linder, 6 U.S.C.M.A. 669, 20 C.M.R. 385 (1956).

[26] *See* CM 403924, Perry, 29 C.M.R. 623, *petition* for *rehearing denied* 29

instruct on sentence that the court must begin their vote on the lightest sentence proposed.[27]

The myriad of cases involving sentencing goes on and on as do the various problems of the law officer charged with their interpretation and application — a burden totally unnecessary for the counterpart of a "civilian judge of the Federal system."[28]

D. *COMMAND INFLUENCE*

In the author's opinion, another major deficiency in the existing system lies in the area of command influence. At the time of adopting the Code, Congress attempted to eliminate command influence through inclusion of an article prohibiting commanders from reprimanding courts-martial personnel or attempting to coerce or influence a court-martial or any convening authority or approving authority with respect to his judicial acts.[29] To put "teeth" into the prohibition, a related article was adopted providing for punitive sanctions against those found guilty of such unlawful conduct.[30] To date there is not one reported case of conviction under article 98, and yet the practice of command influence continues.[31]

Despite his most conscientious efforts to be objective and to prevent his personal feelings from affecting the outcome of courts-martial, a strong commander casts an aura of influence on the courts-martial system, primarily in the area of sentence. Frequently this influence exists only subconsciously in the minds of the court-martial members, *i.e.*, a subconscious effort to satisfy what they feel "the old man" would want done in a particular case. On other occasions influence may be exerted, unwittingly perhaps, through a general comment to a court-martial president or member at a social occasion. In still other cases influence may be directly and intentionally exerted by direct action of the convening authority or his subordinates, with specific intent to correct disciplinary matters in the command, both real and imagined.[32] The fault in many of these instances lies not in the commander or in ineffective codal controls, but in a system where officers responsible to the commander in every other respect are

C.M.R. **586 (1960).**

[27] ***See*** CM **403429,** Mimbs, **29** C.M.R. **603 (1960).**

[28] "United States v. Biesak, **3** U.S.C.M.A. **714, 722, 14** C.M.R. **132, 140 (1954).**

[29] UCMJ art. **37.**

[30] "UCMJ art. **98.**

[31] ***"See, e.g.,*** United States v. Fraser, **15** U.S.C.M.A. **28, 34** C.M.R. **474 (1964);** United States v. Johnson, **14** U.S.C.M.A. **548, 34** C.M.R. **328 (1964).**

[32] ***See*** United States v. Knudson, **4** U.S.C.M.A. **587, 16** C.M.R. 161 **(1954);** **CM 400008,** Olivas, **26** C.M.R. **686 (1958).**

asked to ignore completely his desires in performing this one military function.

E. *COMPROMISE SENTENCES*

Yet another potential area of criticism lies in the highly suspected practice of court members arriving at compromise findings and sentence in difficult cases. That is, in cases in which reasonable doubt exists, a compromise is reached to resolve the doubts of some of the members on the findings by agreeing that a light sentence will be imposed. While no such activity of court members can be documented by the author, extensive practice before courts-martial has given rise to grave suspicion that this highly reprehensible manner of dispensing justice may occur in instances in which the court members are heavily taxed with a close or potentially unpopular decision. Even in those instances in which there is no compromise on the findings in return for a lenient sentence, the sentencing procedure all too often appears to be merely a numerical compromise rather than a pragmatic judgment, based on accepted theories of penology.

F. *UNNECESSARY BURDEN ON COURT MEMBERS*

The final, but by no means least, important objection to the existing sentencing procedure lies in the fact that it is an unnecessary and time consumptive burden on the line officers called upon to perform the duties of court-martial members. Concededly, at first thought it seems absurd to say that a matter as serious and as necessary to the system as military discipline is a waste of time of military officers, yet, when the statement is weighed in view of the facts it becomes much more credible. During the 1965 and 1966 calendar years, the Army tried three thousand twenty-nine individuals by general courts-martial. Of those cases, two thousand forty-two, or 67.4 per cent, were based on pleas of guilty. Of the cases in which guilty pleas were entered, one thousand six hundred and thirty-four, or 80.01 per cent of the pleas, were entered pursuant to a pretrial agreement, thus rendering the court's sentence in those cases a virtual nullity.[33] This procedure could be likened to a farcical comedy were it not for the irony inherent in the sincere efforts of those court members who, unaware of the existence of "the deal," devote themselves dedicatedly **to** the task of doing justice to the accused.

[33] Statistics furnished by the Records Control and Analysis Branch, U.S. Army Judiciary, Washington. D.C. **20315.**

IV. SENTENCE BY THE LAW OFFICER — THE PANACEA?

Sixteen years ago the United States Congress adopted article 26 of the Code, thereby creating for the first time a military judge patterned "as nearly in the image of a 'civilian judge' as it was possible under the circumstances."[34] The Court of Military Appeals has perpetuated this image by its announced aim "to assimilate the status of the law officer, wherever possible, to that of a civilian judge of the Federal system."[35]

The most obvious dissimilarity between the federal judge and the law officer is the fact that the federal judge has complete authority to impose sentence upon persons convicted of federal crimes, while the law officer has no sentencing function other than to advise the court members concerning their performance of that responsibility. However, the immense satisfaction of Congress and forward thinking military legal personnel with the manner in which the law officer program has progressed may soon obviate this dissimilarity. Currently, Congress is studying a proposal which greatly enlarges the authority of the law officer by empowering him, upon request of the accused, to act alone in trying and sentencing military offenders.[36] Although this progressive legislation should be a welcome addition to the rapid and efficient administration of military justice, in the opinion of the writer it is not sufficiently comprehensive as it fails to vest sentencing authority exclusively in the law officer of general courts-martial, irrespective of the election of the accused.

The writer does not contend that the substitution of the judgment of the law officer for the collective judgment of court members will alone make great progress toward more enlightened sentencing. The main thrust of the argument is that the participation of a mature legal officer in a sentencing procedure closely related to that followed in the federal court system would permit sophisticated and informed judgments which take into account a wide range of factors from the likelihood that the accused will commit other crimes to the types of programs and facilities which

[34] United States v. Renton, 8 U.S.C.M.A. **697,** 701, **25** C.M.R. **201, 205 (1958).** ***See Hearings on H.R. 2/98 Before a Subcommittee of the House Committee on Armed Services,*** 81st Cong., 1st Sess. **607 (1949).**

[35] United States v. Biesak, **3** U.S.C.M.A. **714, 722, 14** C.M.R. **132, 140 (1954).**

[36] H.R. **16115,** 89th Cong., 2d Sess. § **816** (1966), provides: "Art. **16.** Courts-martial classified: The two kinds of courts-martial in each of the armed forces are **(1)** general courts-martial, consisting of (a) a military judge and not less than five members; or (b) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with counsel, requests in writing a court composed only of **a** military judge . . . ."

may induce a change in the pattern of activity which led to the offense.

A. *FREEDOM FROM COMMAND INFLUENCE*

Designating the law officer as the sentencing authority in general courts-martial is the first prerequisite to improvement of the system, as it is only through a truly independent judge that the constant spectre of command influence can be eradicated from the sentencing procedures.

The law officer has, in fact, become an independent judge by virtue of several factors: First, Congress required that the law officer be a lawyer particularly qualified to perform the duties of that office.[37] Inherent within those qualifications necessary to the law officer function is the ability to carry out his responsibilities without regard to the pressure of outside influences. Secondly, a separate Judge Advocate General's Corps was established in the Army to insulate the judge advocate from the normal chain of command.[38] The enlightened policies of The Judge Advocate General of the Army has resulted in further administrative measures to effectuate this purpose. With the establishment of the Army's law officer program, the function of law officer was assigned to a group of carefully selected judge advocates, normally for a three-year period. They were formed into a specialized division within the Office of The Judge Advocate General, the Field Judiciary, under direct command of The Judge Advocate General.

The law officer is not assigned to the command of any convening authority, and his work is not supervised by any convening authority or staff judge advocate. He is assigned to a convenient duty station within a judicial circuit and serves where needed within that circuit. His availability to conduct court-martial trials is managed by himself and the senior judicial officer in the circuit.[39] This separate organization and specialization of function increases the expertise and independence of the law officer and relieves him from any obligation inconsistent with his judicial functions. To further insulate the law officer from "inside" influences, as well as those from without, The Judge Advocate General of the Army promulgated a measure which organized all

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"UCMJ art. 26.

"The separate Corps was established for the Army by the Elston Act, as embodied by amendment in the Selective Service Act of 1948, 62 Stat. 604, 643 (1948.

[39] Army Reg. No. 22-8 (14 Oct. 1964) [hereafter cited as AR 22-8].

judge advocates who perform triai or appellate judicial or appellate counsel functions into a separate Class II activity — the United States Army Judiciary, which is largely self-supervised and is administratively removed from the direct control of The Judge Advocate General.[40] Superimposed upon the mechanical factors listed herein, which have seemed to minimize the incidence of command influence concerning the law officer, is the Court of Military Appeals with its avowed intent to eliminate even the most remote possibility of command tampering in the area of the judicial function.41

In contrasting the immunities and insulation afforded the law officer in the exercise of his functions with those of the court members, it becomes apparent that the key ingredient of a just sentence, complete freedom from outside influences, can best be attained by vesting sentencing authority in the law officer.

To preclude the possibility in a law officer sentencing system that a convening authority might attempt to affect the outcome of certain cases by the selection of a law officer thought to deal more severely or leniently with certain types of cases, the authority to appoint the law officer for a particular case should be removed from the convening authority and be placed in the Circuit Judicial Officer. Appointment of the law officer to act in the case should be done by the Circuit Judicial Officer only after the case or cases to be tried have been referred for trial and should be based solely upon notice emanating from the convening authority — preferably written — advising only that a case or cases are to be tried on a certain date, the law officer's schedule permitting. The notice would not include any information concerning the nature of the case, parties involved, or counsel, but could include the fact that the cases are to be contested or heard on pleas of guilty to facilitate scheduling. Once the law officer has been appointed for the trial of a case and the danger of "judge shopping" has been obviated, the law officer may, of course, be furnished additional information to permit his familiarization with the case to the extent authorized.[42]

B. *COMPREHENSIVE PRESENTENCING PROCEDURES*

A second, but by no means secondary, step toward enlightened sentencing in general courts-martial is the adoption of more

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[40] AR 22–8.

[41] *See* United States v. Boysen, 11 U.S.C.M.A. 331, 29 C.M.R. 147 (1960); CM 398680, Godwin, 25 C.M.R. 600 (1958).

[42] *See* United States v. Mitchell, 15 U.S.C.M.A. 516, 36 C.M.R. 14 (1956).

complete presentence procedures. As noted in the ***Model Penal Code:***

> In any system in which large discretion as to sentence has been vested in the court, it is obviously of the first importance that the court obtain accurate information on the many matters that are relevant to what the sentence ought to be .... [T]he evidence [at trial] is likely to give relatively little insight with respect to the history and character of the offender. There is, therefore, a need for systematic methods to provide this necessary information, a need that our society has met increasingly by the development of a presentence inquiry ....[43]

The federal courts have long recognized the effectiveness of the presentence inquiry.

> [Presentence]reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.44

In **1945,** ***Federal Rule of Criminal Procedure*** **32(c)** was adopted to permit the federal judge to require a comprehensive investigation into the background of the accused for his use in determining an appropriate sentence. Likewise, the Standard Probation and Parole Act of **1955** provides that:

> No defendant convicted of a crime the punishment for which may include imprisonment for more than one year shall be sentenced, or otherwise disposed of, before a written report of investigation by a probation officer is presented to and considered by the court. The court may, in its discretion, order a pre-sentence investigation for a defendant convicted of any lesser crime or offense.[45]

Section 7.07 of the ***Model Penal Code*** recommends a higher and more detailed standard that would require a presentence inquiry not only in all felony cases but in any other case in which the defendant was under the age of twenty-one where he might be placed on probation or sentenced to an extended term.[46]

The sentencing procedures presently followed in courts-martial are somewhat analogous to the presentence inquiry, but, as

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[43] MODEL PENAL CODE § 7.07, Comment (Tent. Draft No. 2, 1964).

[44] Williams v. New York, 337 U.S. 241, 249-50 (1949) (footnote omitted).

[45] STANDARD PROBATION AND PAROLE ACT OF *1955* § 11.

[46] An "extended term'' under the Code is a longer period of imprisonment than are the ordinary terms applicable to other offenders. In the discretion of the court it may be applied to recidivists, multiple offenders, professicnal criminals, and serious deviants.

previously noted, are greatly restricted due to the risk of prejudice arising from the court members' placing undue emphasis on the extrinsic evidence presented.

It is the contention of the writer that placing the law officer in a position analogous to that of the federal judge with respect to sentencing would alleviate the necessity for a restricted presentence inquiry. The average law officer is a lawyer of some fifteen to twenty years' experience as a judge advocate. In the vast majority of cases he has had extensive experience in the field of criminal law as trial and defense counsel, appellate counsel, chief of military justice, or staff judge advocate. It seems safe to say that normally the law officer brings to the bench a knowledge of criminal law and a judicial sophistication which is at least the equivalent of his civilian counterpart, who has long since been entrusted with the authority to impose criminal sentences on the basis of a comprehensive investigation into the background of the accused.

To be truly effective, the proposed presentence inquiry should be carried out in an informal atmosphere with the law officer presiding in the presence of the accused, counsel, and the reporter. Although the entire proceeding should be recorded to permit review by appellate authorities, there should be no attempt at formalism and all rules of evidence and procedure should be greatly relaxed or dispensed with.[47] Prior to convening the presentence hearing, the law officer must have studied a detailed report on the accused, provided by the joint efforts of the Military Police Criminal Investigation Division, the defense counsel, and the trial counsel. The report should include the following matters:

(1) A psychiatric report containing complete findings as to the sanity of the accused, the existence of character and behavior disorders, if any, a resume of the background of the accused, including his educational level, intelligence, and adolescent environment, findings as to rehabilitation potential and recommendations concerning the type and amount of punishment likely to be most effective in the rehabilitation process;

(2) The complete personnel file of the accused, which would include on the negative side all letters of reprimand, punishments under article 15, administrative reductions, and convictions by courts-martial, as well as the positive indications of good character and efficiency such as letters of commendation, record of promotions and appointments to responsible positions, and awards and decorations;

[47] *See* State v. Pope, 257 N.C. 326, 333, 126 S.E.2d 126, 133 (1962).

(3) The complete criminal record of the accused outside the military establishment, including juvenile convictions;

(4) Sworn statements of the accused's immediate superiors and associates containing their personal observations concerning the accused's performance of duty, character, and efficiency;

(5) Statements of family and friends in the civilian community:

(6) Any other evidence deemed pertinent to the question of sentencing.

During the presentence hearing, the law officer should be free to interrogate the accused concerning any matters relevant to the proceedings, subject only to the right of the accused to be free of self-incrimination. All adverse matters in the report should be brought to the attention of the accused and his counsel for rebuttal purposes.[48] Witnesses requested by the accused or the law officer should be heard with the right of informal cross-examination preserved. Both counsel and the accused should be permitted the right to comment on all evidence and make recommendations and appeals to the law officer.

Unlike the present sentencing procedure, which immediately follows the findings of guilty and may sometimes be abbreviated by the approach of the end of the duty day, the presentence inquiry of the law officer should follow the common civilian practice of setting a future date for sentencing to permit a full study of the presentence report and adequate preparation by counsel. However, in the case of guilty pleas accepted by the law officer without participation of court members, the law officer could proceed directly to the presentence inquiry as the study of the report should have been completed prior to the convening of the case.

In addition to assisting the law officer in the exercise of the sentence function, the presentence inquiry should prove valuable to correctional facilities for classification and treatment planning. The report should, as a matter of standard practice, be forwarded to the confinement facility in all cases involving a sentence to confinement.

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[48] FED. **R.** CRIM. P. **32(c) (2)** leaves to the discretion of the sentencing judge the question of disclosure of matters contained in the presentence report. In many instances a defendant in federal court proceedings is refused access to the information contained in the report. ***See*** Higgins. ***Confidentiality*** *of* ***Presentence Reports, 28*** **ALBANY L.** REV. **12, 16-16 (1964).**

C. INDIVIDUALIZED SENTENCING

As effective as the presentence inquiry might be in determining the individual characteristics and personal needs of the accused, its full effect would be greatly reduced in the absence of provisions granting the sentencing authority wide discretion in tailoring a sentence to individual needs. "The best sentencing statutes are those which permit the judge a choice among the whole range of dispositions."[49] "There can be no fixed formula for the determination of wise and appropriate sentences."[50]

The *Model* Penal *Code* lists four general purposes of the provisions governing the sentence and treatment of offenders:

(a) To prevent the commission of offenses;

(b) To promote the correction and rehabilitation of offenders;

(c) To safeguard offenders against excessive, disproportionate or arbitrary punishment;

(d) To give fair warning of the nature of the sentences that may be imposed on conviction of an offense."

Of these four general purposes, the military sentence with its fixed periods of confinement, punitive discharges, and system of fines and forfeitures seems to have concentrated its efforts toward (a) and (d) with too little regard for the remaining purposes. This is true, despite the fact that leading penologists have virtually unanimously agreed that those neglected purposes should be paramount in our society today. The Supreme Court has officially recognized this penological trend by stating: "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence"[52]

While it is recognized that the stern necessities of the military require a standard of discipline and instant obedience to orders which can be maintained through a fear of summary retributive punishment, the application of that principle to the exclusion of the principles of rehabilitation and reformation brands the system as archaic and outmoded.

D. THE INDETERMINATE SENTENCE

To align military criminal jurisprudence with its civilian counterpart, there should be a revision not only of the sentencing

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[49] "ADVISORY COUNCIL OF JUDGES OF THE NATIONAL PROBATION AND PAROLE ASSOCIATION, GUIDES FOR SENTENCING 48 (1957).

[50] Levin, *Sentencing the Criminal Offender*, 12 FED. PROB. Mar. 1949, at 3.

[51] MODEL PENAL CODES § 1.02(2)a-d (Off. Draft, 1962).

[52] Williams v. New York, 337 U.S. 241, 248 (1949) (footnote omitted).

authority and presentence procedures, but also of the authorized sentences. Greater latitude should be allowed in tailoring the sentence to the particular needs of society and to the individual accused. One means to this end, followed in a great number of progressive state jurisdictions,[53] is the establishment of an indeterminate sentence.

> That prison sentences should be indefinite in length appears entirely clear on the basis of experience and reason. The length of time that an offender should be retained cannot be precisely determined in advance but should be related to his behavior and attitude in the correctional situation.[54]

While there are a variety of indeterminate sentence procedures,[55] the one best suited to the military would appear to be the one in which the law officer establishes, within the existing maximum sentences set by the president, both a minimum and a maximum sentence to confinement. This procedure would serve the maximum needs of criminal justice by establishing the outer limits of a term of Confinement that will assure sufficient incapacitation to protect the public; provide some gradation for general deterrence; take into account the moral-educative function of sentencing; protect the offender from excessive and inhumane detention; and provide fair opportunity for rehabilitative effect, if this can be achieved. In short, the indeterminate sentence seems to satisfy all of the recognized goals of penal philosphy by protecting society from the criminal, educating him and others to the dangers of criminal conduct, and at the same time availing him the opportunity, through cooperation with social scientists, to rehabilitate himself to an acceptable level and thereby determine for himself the amount of punishment which he must serve beyond the minimum stipulated by his sentence.[56]

To protect against one of the abuses occasionally found in indeterminate sentence jurisdictions — the practice of

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[53] Arizona, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, Nevada, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming, and District of Columbia.

[54] P. TAPPAN, CRIME, JUSTICE AND CORRECTION **469 (1960).**

[55] ***See*** Note, ***Indeterminate Sentencing— Half-Step Toward Science Law,*** **10 W. RES. L.** REV. **574 (1959).**

[56] It is not contemplated that the minimum sentence imposed by the law officer will act to supersede the clemency and parole function carried on within confinement facilities in accordance with Army Reg. No. 63-10 **(21** Jul. **1967),** and Army Reg. No. **633–20 (19** Jun. **1956).** The minimum sentence determined by the law officer should be one factor considered by clemency boards in the exercise of those functions, however.

establishing the minimum and maximum sentence close together at nearly the maximum authorized — legislation authorizing such punishment should provide that the minimum sentence imposed by the law officer cannot exceed one-third of the statutory maximum sentence.57 For example, in a case of desertion, terminated by apprehension, the law officer could not impose a minimum sentence to confinement in excess of one year since the maximum confinement authorized for that offense is three years.[58] The minimum sentence could, of course, be less than one year, but not more. The maximum sentence under this procedure could be set at any term up to the statutory maximum — three years.

E. *ADMINISTRATIVE DISCHARGES*

An additional prerequisite to individualized punishment which has been denied the military courts-martial is the authority to order an administrative discharge in those cases in which a punitive discharge is not appropriate but there is a definite need for separation of the accused from the service.[59] In the opinion of the author, it is a gross miscarriage of justice to punitively separate an individual who has been so psychologically warped through environmental circumstances or mental disorders not amounting to insanity that he is unable to adhere to societal norms. Life for that individual is made sufficiently difficult without bearing the additional stigma of a dishonorable or bad conduct discharge. On the other hand, once the individual has appeared before a general court-martial and exhibited an antisocietal personality, it seems unnecessarily duplicitous for the sentencing authority to forbear the sentence of separation when it is likely that future misconduct will necessitate that the individual be administratively separated. The interests of justice and administrative efficiency can both be met by granting to the law officer the additional discretion to impose an administrative discharge in those cases in which the presentence inquiry clearly indicates the advisability of such a course of action.

F. *SUSPENDED SENTENCES*

A most necessary adjunct to the authority of the law officer to impose sentence in general courts-martial is the power to suspend,

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[57] This limitation is in accord with that followed in the federal courts under one type of indeterminate sentencing practiced. 18 U.S.C. § 4208 (1964).

[58] MCM ¶ 127*c*.

[59] *See* NCM 5505513, Calkins, 20 C.M.R. 543 (1956).

with provision for automatic remission, all or any part of the sentence handed down. The salutory effect which a suspended sentence can have on the future conduct of those found guilty of crime is poignantly described by John Augustus, who has been credited by American criminologists with the development of the forerunner of our modern system of probation. Of his first experience in bailing out a "common drunkard" from the Boston city jail in 1841. Augustus wrote:

> He was ordered to appear for sentence in three weeks from that time. He signed the pledge and became a sober man: at the expiration of this period of probation, I accompanied him into the court room; his whole appearance was changed and no one, not even the scrutinizing officers, could have believed that he was the same person who less than a month before had stood trembling on the prisoner's stand .... The judge expressed himself much pleased with the account we gave of the man, and instead of the usual penalty — imprisonment in the House of Correction — he fined him one cent and costs, amounting in all to $3.76, which was immediately paid. The man continued industrious and sober, and without doubt has been by this treatment saved from a drunkard's grave.[60]

In federal and state jurisdictions, probation and suspended sentences are widely used as instruments of rehabilitation of offenders. Unfortunately, modern state statistics on sentencing are not available since the Bureau of the Census abandoned the publication of Judicial Criminal Statistics in 1946.[61] Statistics for the year 1945, however, indicate that probation or suspended sentences were employed in 31.6 percent of the cases of defendants sentenced for major offenses in the courts of twenty-five reporting states.[62] The use of probation and suspended sentences is prevalent in the eighty-six federal district courts in the United States and is increasing. In the fiscal year ending June 30, 1956, this form of sentence had been used in 42.2 percent of federal convictions.[63]

In general courts-martial, suspended sentences seem to be rarely used as a means of rehabilitating offenders. In the experience of the author, the offender who has committed a complicated crime, difficult of proof, is, by virtue of his strong bargaining position in pretrial agreement negotiations, more likely to receive a suspended sentence than is an offender easily convicted. but

[60] A REPORT OF THE LABORS OF JOHN AUGUSTUS, FOR THE LAST TEN YEARS, IN AID OF THE UNFORTUNATE (1852), reprinted in C. CHUTE, JOHN AUGUSTUS, FIRST PROBATION OFFICER (1939).

[61] *See* Alpert, *National Series of State Judicial Statistics Discontinued,* 39 J. CRIM. L. 181 (1948).

[62] BUREAU OF THE CENSUS, 1949 JUDICIAL CRIMINAL STATISTICS, table 4 (1947).

[63] FEDERAL PRISONS, table 32 (1956).

whose youth, first offender status, or rehabilitative potential renders him a more suitable object of this form of clemency.

Under the present procedure, the apparent reason for the limited used of suspended sentences is that the court members who hear the testimony in extenuation and mitigation and have the opportunity to observe the demeanor of the accused may recommend clemency.[64] but have no authority to suspend the sentence which they impose, despite the fact that they may be strongly disposed to do so.[65] In the absence of a pretrial agreement including suspension as one of the conditions of a guilty plea, the best remaining hope of the accused for an immediate post trial suspension of sentence lies in the recommendation of the staff judge advocate in the post trial review. Therefore, what the present system affords is a determination of the advisability of suspending a sentence by a convening authority who, in all likelihood, has never seen the accused, did not hear the testimony, has not read the record of trial, and who must act primarily on the advice of his staff judge advocate. The advice of the staff judge advocate, although based on a post trial interview with the accused and a thorough review of the record, is likewise deficient in many instances due to the fact that it is based on the written record of events rather than personal observations of the trial. Also, the opinions of the staff judge advocate concerning possible clemency are conceivably somewhat colored by his recommendations in the pretrial advice, inasmuch as the *Staff* Judge *Advocate Handbook* states that:

> There is no justification for referring charges to a general court-martial for trial when a punitive discharge is not authorized for one or more of the offenses alleged, nor in referring such charges when it is likely that any adjudged punitive discharge would not be approved by the convening authority when he takes action.[66]

Logically, the most intelligent decision concerning the feasibility of suspending all or a portion of a sentence can be made by the agency who, through the advantages of trial presence and an exhaustive inquiry into the background of the accused, is responsible for tailoring a sentence to meet the needs of the accused and society. Under the hypothesis of the author, in the military system this person can only be the law officer.

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[64] MCM ¶ 77*a*.

[65] *See* United States v. Kaylor, 10 U.S.C.M.A. 139, 27 C.M.R. 213 (1959); United States v. Marshall, 2 U.S.C.M.A. 342, 8 C.M.R. 142 (1953).

[66] U.S. DEP'T OF ARMY, PAMPHLET NO. 27-5, STAFF JUDGE ADVOCATE HANDBOOK 17-18 (1963).

While it may be anticipated that an outcry will arise from commanders, fearful that granting suspension authority to the law officer will require them to accept the return of offenders whom they have sought to eliminate from their commands, such fears would appear to be groundless. A law officer would be extremely remiss in his duties to both the Government and the accused, if, during the pretrial inquiry to determine sentence, he failed to obtain the opinions of commanders and others most intimately associated with the accused concerning his rehabilitation potential, including whether or not he would be accepted within his former command if a suspended sentence was imposed. In those instances which the law officer found suspension to be advisable, despite the contrary recommendations of the immediate commander, it would be appropriate to provide, as a part of the sentence, that the accused be transferred to another unit to facilitate his rehabilitation.

As a neseccary comcomitant of the law officer's authority to suspend sentences, he should also preside over vacation procedures in the event of a subsequent violation by the accused. To make an enlightened decision in the show cause hearing, the law officer should study the presentencing report as well as receive evidence of post trial conduct.

V. THE PRETRIAL AGREEMENT AND THE LAW OFFICER

The Army practice of the convening authority entering into a pretrial agreement with an accused in return for his plea of guilty arose in 1953 at the instigation of Major General Franklin P. Shaw, then the Assistant Judge Advocate General of the Army.[67] The purpose of the pretrial agreement, according to its proponents, is to bring the military practice more closely in accord with civilian criminal procedures and to secure the mutual advantages of this abbreviated procedure to the government and the accused.[68] As envisioned by General Shaw and other advocates of the system, pretrial agreements have been widely accepted and have resulted in a high percentage of guilty pleas in general courts-martial,[69] thereby undoubtedly resulting in great savings to the Government in time and expense. The effects of the pretrial

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[67] *See* Letter from Office of The Judge Advocate General to Army Staff Judge Advocates, 23 Apr. 1953.

[68] *Id.*

[69] Statistics furnished by the Records Control and Analysis Branch, U.S. Army Judiciary, Washington, D.C. 20315.

agreement may not have been all positive, however. Some of the possible negative aspects of the negotiated plea have been touched upon earlier in this article, wherein it was pointed out that the negotiated plea has a negative effect on the court in many cases as it renders the sentence of the court-martial a virtual nullity. Secondly, it was noted that if the court members become aware of the negotiated plea they are likely to abandon their sentence function in the belief that their action has been rendered nugatory. Thirdly, the pretrial agreement may often be arrived at with greater regard for the bargaining position of the accused — the difficulty and expense of proving his offense — than for the needs of the accused and the Government.

From an ideological standpoint, therefore, it would appear that the negotiated plea should have no place in a system of law officer sentencing such as that described on the preceding pages. It seems incongruous to say that the law officer should painstakingly examine the life history of the accused and apply all of his knowledge, ability, and experience to the task of tailoring a sentence to the precise needs of the accused only to have that sentence drastically modified by the convening authority pursuant to a pretrial agreement based on practical considerations alone. The incongruity disappears, however, when it is realized that the proposed system of law officer sentencing offers, for the first time, a solution to the problem of combining scientific sentencing with the practical considerations of the pretrial agreement system. This compatibility may be achieved by permitting the convening authority to enter into the usual pretrial agreement with an accused, however, it would limit his authority with respect to confinement — the most meaningful portion of the agreement to the average accused — to establishing only the minimum portion of the indeterminate sentence to confinement, leaving the maximum to be established by the law officer. The pretrial agreement could thus be used to provide a dual incentive to a military offender. The first incentive is derived from the fact that the convening authority would be bound by the agreement to approve only that portion of the minimum sentence handed down by the law officer as corresponded to the pretrial agreement. This should provide sufficient incentive to the accused to enter a plea of guilty where appropriate, as he is thereby guaranteed a definite minimum time at which he is to become eligible for release from confinement and this minimum eligibility date may well be lower than that imposed by the law officer. The second incentive to the accused is derived from the fact that the minimum term agreed

upon is only an eligibility date, the date of actual release being conditioned upon good behavior while in confinement. In the event of misconduct by the offender while in confinement, he could be retained for a period not to exceed the maximum sentence established by the law officer at trial. Thus, the second incentive for the accused is to be a model prisoner and work toward self-rehabilitation so as to obtain his release from confinement on the earliest possible date.

To illustrate the proposed system, assume that an accused charged with robbery faces almost certain conviction of the offense. Under the author's proposed sentencing formula, he would be confronted with a possible indeterminate sentence to confinement of three years and four months, to ten years.[70] The portential severity of the sentence should offer incentive to the accused to attempt to minimize his punishment by entering into a pretrial agreement with the convening authority. Assume further that the convening authority consents to an agreement providing for a dishonorable discharge, total forfeitures, reduction to the grade of private E-1, and confinement at hard labor for a minimum period of two years. Subsequently, upon his plea of guilty, the accused is sentenced by the law officer to a bad conduct discharge, total forfeitures, reduction to the grade of private E-1, and confinement at hard labor for a period of three to five years. The convening authority, after completion of appellate review, could approve only so much of the sentence as provides for bad conduct discharge, total forfeitures, reduction to the grade of private E-1, and confinement for a period of two to five years. While the accused, by virtue of the pretrial agreement, would be guaranteed a review of his case to determine his eligibility for release from confinement at the end of two years, he would not automatically be released unless during his confinement he had successfully demonstrated to the officials responsible for his detention that he had been rehabilitated to the extent that he could properly be released.

This type of pretrial agreement should avoid unnecessary litigation of cases and still permit the tailoring of sentences to achieve the most important of the currently recognized goals of criminal jurisprudence — the reformation and rehabilitation of prisoners.

Under the author's proposed system the law officer would not be made aware of the existence of the pretrial agreement, as knowl-

[70] The offense of robbery carries a maximum punishment of dishonorable discharge, total forfeitures of all pay and allowances, reduction to the grade of private E-1 and confinement at hard labor for ten years. MCM ¶ 127c.

edge of the agreement could tend to affect his judgment in the case. He would instead proceed to judgment on the sentence as though no pretrial agreement existed. Although this procedure could seemingly be criticized on the basis that, like the present system, it acts to nullify a sentence arrived at upon due deliberation, in actuality the sentence of the law officer is by no means rendered moot by the existence of the pretrial agreement. The law officer is charged with the sole responsibility of determining the maximum confinement term awarded, since the pretrial agreement can in no way affect that portion of the sentence. Additionally, the broad power of the law officer to tailor sentences, including the power to order administrative discharges and suspend sentences imposed, makes his sentencing function a most important one even in the presence of a pretrial agreement between the accused and the convening authority.

VI. THE ROLE OF THE CONVENING AUTHORITY IN THE NEW SYSTEM

While expansion of the role of the law officer in the system proposed herein must of necessity trench somewhat on the functions of the convening authority, the expansion should by no means render that authority impotent in the area of military discipline.

Under the system of law officer sentencing, the convening authority would be required to relinquish authority to appoint the specific law officer to sit on a particular case,[71] and the authority to conduct pretrial negotiations with the accused on the maximum term of confinement which he is to serve.[72] The remaining authority currently vested in the convening authority, *i.e.*, investigation of charges,[73] convening of courts,[74] reference for trial,[75] and review of the findings and sentence[76] would remain unchanged.

It is not anticipated that the increased role of the law officer would meet with any great opposition from general court-martial convening authorities. It should be readily recognized by convening authorities that they are not being removed from their

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[71] UCMJ art. 26.

[72] *See* U.S. DEP'T ARMY, PAMPHLET No. 27-5, STAFF JUDGE ADVOCATE HANDBOOK 18 (1963).

[73] UCMJ art. 32.

[74] UCMJ arts. 22, 27, 28.

[75] UCMJ art. 34.

[76] UCMJ arts. 59-64.

disciplinary role or hamstrung in its accomplishment, but are instead being freed of criticism and allegations of command influence and provided new and dynamic assistance in carrying out their role through highly capable legal officers and modernized techniques.

VII. JUDGE ADVOCATE REACTION TO THE PROPOSED SYSTEM

During the preparation of this writing, a questionnaire was sent to **143** staff judge advocates, law officers, and senior judge advocates throughout the world, summarizing the author's opinion that sentencing authority should be vested in the law officer of general courts-martial. The questionnaire requested that the recipients indicate their concurrence or nonconcurrence in that opinion. Of the **111** officers replying to the questionnaire, **82** or **73.8** percent indicated their concurrence in the proposal to vest sentencing authority in the law officer, while 29 recommended retention of the present sentencing system.

Additionally, although not actively solicited to do so, the majority of those officers providing a reply indicated the reason for their concurrence or nonconcurrence. The reasons and related observations of those officers are listed below — the ones most frequently mentioned appearing first.

Comments of those favoring law officer sentencing:

1. Program would permit use of comprehensive presentence inquiry.

2. Would free the court members of time consuming sentencing procedures.

3. Would provide a greater freedom from command influence.

4. Would provide more uniform sentences.

5. Should be used in conjunction with indeterminate sentencing procedures.

6. Would provide greater use of suspended sentences.

7. Law officer should be granted authority to act on both findings and sentence.

8. Would avoid inappropriate or illegal sentences and reduce appellate corrective action.

9. Authority should not extend to capital cases.

10. Law officer should be authorized to award administrative discharges.

11. Law officers should receive extensive training in social sciences.

12. Would avoid instructional complications.

13. Law officers should be replaced by civilians.

Comments of those favoring retention of court-martial sentencing:

1. Mitigation authority of the convening authority assures fairness under the present system.
2. Discipline is the function of commanders.
3. Collective judgment of court members preferable to one man decision.
4. Law officer not sufficiently experienced to assume function.
5. Law officer unaware of command problems.
6. Burden too great for the law officer.
7. System should be improved within its present scope.
8. Law officer sentencing should be applied to guilty pleas only.
9. System would be objectionable to senior commanders.
10. System would be violative of military tradition.
11. Penologist's approach to sentencing inapplicable to military.

VIII. CONCLUSIONS AND RECOMMENDATIONS

The initial steps away from the "millstone" of courts-martial sentencing toward the "milestone" of more enlightened justice in a comprehensive system of sentencing by the law officer must of necessity be accomplished by the Congress and the Executive Department. However, to be prepared for the expanded role which the law officer is to play under legislation currently pending in Congress,[77] or any subsequent legislation adopted reflecting an accord with the recommendations of this article, a two-step program should be developed by the Office of The Judge Advocate General to enhance the professional competence of the law officer.

The initial step in the program should be to provide law officers concentrated courses of instruction in fields related to criminology, sociology, penology and psychology, as well as refresher courses in the various aspects of military justice. These courses could probably best be provided under the auspices of The Judge Advocate General's School in cooperation with appropriate branches of the University of Virginia.

The second step in such a program should be to establish a series of judicial conferences, during which law officers could meet on a regular basis to discuss mutual problems and work together toward adoption of a more uniform sentencing philosophy throughout the Army. In his report to the Judicial Conference of

[77] H.R. 16115, 89th Cong., 2d Sess. (1966).

the United States in March 1957, the Attorney General of the United States pointed out the need for periodic conferences among criminal judges:

> The basic shortcoming of the present sentencing system is the lack of a uniform sentencing philosophy. This has resulted in disparate sentences being imposed even where by comparison the crime and the background of the criminal are substantially similar. Such a result is unfair and poses serious morale problems. Therefore, in consultation with representatives of the courts we are attempting to formulate a program (both legislative and administrative) which will provide for greater uniformity in sentences without at the same time withholding from the sentencing authority the power to fit the punishment to the criminal and not necessarily to the crime.[78]

In March 1958, the Judicial Conference of the United States approved H.R.J. Res. 424 (introduced by Congressman Celler), as amended. The July 1958 Senate report on the resolution stated in part:

> The proposed legislation is recommended by the Judicial Conference of the United States. It authorizes Federal judges to form joint councils and institutes under the auspices of the Judicial Conference of the United States for the purpose of studying, discussing, and formulating the objectives, policies, and standards for sentencing those convicted of Federal offenses. These groups are intended to serve chiefly as a means by which Federal judges may reach a desirable degree of consensus as to the types of sentences which should be imposed in different kinds of cases.[79]

The legislation was approved by the President on August 25, 1958, as Public Law 85-752.[80]

Through September 1965, sixteen such judicial conferences had been held. The almost immediate success with which the conferences met was described in 1965 by Mr. James V. Bennett, retired Director of the Federal Bureau of Prisons, as follows:

> In 1937 there was little consensus among the Federal Courts as to how individual offenders should be handled or as to the basic considerations involved in the sentence. In 1964, as a result of the 1958 sentencing act, three major sentencing institutes were conducted — one at Denver, Colorado, in February, and two others scheduled for later in the year at Lompoc, California, and Lewisburg, Pennsylvania. The institute program by 1964 had virtually ended the flagrantly disparate sentence and it had brought about a close working relationship between the Federal courts and the prison system.[81]

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[78] 1957 JUDICIAL CONFERENCE OF THE UNITED STATES ANN. REP. 301.
[79] S. 2013, 85th Cong., 2d Sess. § 3 (1964).
[80] 28 U.S.C. § 334 (1964).
[81] 1964 BUREAU OF PRISONS ANN. REP. 16.

The United States Disciplinary Barracks would be a logical place for the law officer conferences to be held, as this would permit the law officers to confer with those officials responsible for the detention and rehabilitation of the bulk of general court-martial prisoners and thereby obtain first hand information on the effectiveness of their sentencing procedures.

The criminal law today is in a state of transition. Civilian legal authorities are pressing on with new and dynamic methods of providing equal justice under the law. It is incumbent upon those responsible for the administration of military justice to join in the search for more effective criminal procedures and thereby eliminate the causes of the criminal's lament: "I am a man, more sinned against than sinning."[82]

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[82] Shakespeare, Tragedy of King Lear, Act 111, Scene 11.

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A SUPPLEMENT TO THE SURVEY OF MILITARY JUSTICE*

By Captain Alonzo Clifford Shields, III**

I. INTRODUCTION

This supplement covers the cases decided by the United States Court of Military Appeals during the October 1965 term, 29 October 1965 to 9 September 1966.[1] The purpose of the supplement is to present a digested version of the important substantive and procedural issues decided by the Court of Military Appeals during that term.

II. JURISDICTION

In *United States v. Burns,*[2] the Court of Military Appeals was confronted with an unusual factual situation. The accused had enlisted in the Regular Army on 24 February 1958 for three years. Prior to completing his term of enlistment he was released from active duty and assigned to the Army Reserve to complete his reserve requirement. Then, 76 days after his release, he reenlisted for three years' active duty. During this term, the accused absented himself without authority from his organization. A year and a half later he was apprehended by the FBI. During this period of absence without authority the accused received an honorable discharge from the Army Reserve. At trial, the accused's counsel argued the court-martial had no jurisdiction over the accused because he had been previously discharged. The Court of Military Appeals disagreed, indicating the honorable discharge

* The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] Consideration by Court term is the practice adopted in the previous seven supplements. *See generally Note, Survey of the Law, The United States Court of Military Appeals, 29 November 1951 to 30 June 1958,* 3 MIL. L. REV. 67 (1959); Sides & Fischer, *A Supplement to the Survey of Military Justice,* 8 MIL. L. REV. 113 (1960); Davis & Stillman, *A Supplement to the Survey of Military Justice,* 12 MIL. L. REV. 219 (1961); Croft & Day, *A Supplement to the Survey of Military Justice,* 16 MIL. L. REV. 91 (1962); Mittelstaedt & Barrett, *A Supplement to the Survey of Military Justice,* 20 MIL. L. REV. 107 (1963); Schiesser & Barrett, *A Supplement to the Survey of Military Justice,* 24 MIL. L. REV. 125 (1964); Wingo & Myster, *A Supplement to the Survey of Military Justice,* 28 MIL. L. REV. 121 (1965); Taylor & Barrett, *A Supplement to the Survey of Military Justice,* 32 MIL. L. REV. 81 (1966).

[2] 15 U.S.C.M.A. 553, 36 C.M.R. 51 (1965).

certificate related only to his reserve obligation and was not a discharge from his reenlistment contract.

In 1960, the Court of Military Appeals denied the petition of Earl E. Frischholz requesting a review of his general court-martial conviction. The sentence was executed and Frischholz was dismissed from the Air Force. In 1965, the United States District Court for the District of Columbia turned down his application for relief suggesting the issues raised by the accused should be first considered by the Court of Military Appeals. This resulted in a petition to the Court of Military Appeals for a Writ in the Nature of Error Coram Nobis and the case of ***United States v. Frischholz.***[3] The Court of Military Appeals determined that 28 U.S.C. § 1651a, "The All Writs Act," applied to the Court of Military Appeals and therefore had jurisdiction to consider the accused's petition for a Writ of Coram Nobis. The petition was denied because the petitioner failed to present exceptional circumstances not apparent when the Court originally considered the case. This is a prerequisite to the issuance of the requested writ.

In ***United States v. Schuering,***[4] the accused was a Marine Corps reservist who had accepted orders assigning him to inactive duty training and subjecting him to the ***Uniform Code of Military Justice***[5] during regular drills and periods of inactive duty training. During one such drill accused admitted the theft of certain government property and as a result his commanding officer drew up charges for that offense. The accused was then released to go home. The charges were referred to trial and a copy of the charge sheet served on the accused on a non-drill day. A board of review determined that jurisdiction attached at the time of the offense and accused's resulting "office hours" with the commander on that day. The Court of Military Appeals reversed and dismissed the charges. It held that jurisdiction, if it is to survive a change of status on the part of the accused, must attach prior to the change in status. Attachment is accomplished, the Court held, by commencement of action with a view to trial—as by apprehension, arrest, confinement, or filing of charges. Inasmuch as none of these had been accomplished during the drill period, jurisdiction was held not to have attached.

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[3] 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).
[4] U.S.C.M.A. 324, 36 C.M.R. 480 (1966).
[5] Hereafter called the Code and cited as UCMJ.

III. PRETRIAL AND TRIAL PROCEDURE

A. *CHARGES AND SPECIFICATIONS*

1. *Sufficiency.*

The specifications in ***United States v. Herndon***[6] alleged generally that the accused wrongfully and unlawfully obtained "telephone services. . . by knowingly and with intent to defraud give to a direct dialing long distance telephone operator as the telephone number to be charged for a long distance call to telephone number. . . listed with the St. Louis, Missouri, telephone exchange, then being placed by the said [accused] a telephone number that he was not authorized to use," in violation of article **134** of the Code. A board of review held that the specifications were an attempt to allege a form of larceny under article **134,** which was not a violation of article **121** since the subject of the specifications was "a service rather than personal property." Applying the doctrine of preemption, the board held that the accused's conduct did not constitute larceny nor were the acts service discrediting. The Court of Military Appeals reversed the board, stating that the preemption doctrine did not apply in this case. Here no element of larceny was omitted. Thus, the issue was not whether an element had been deleted or added, but whether the telephone services constituted personal property or an article of value within the meaning of article **121** so that they could be stolen. If so, the specification made out a larceny offense and the misnomer of the actual violation did not prejudice the accused. If the services could not be the subject of larceny, the offense was in terms of fraud which is not specifically punishable under the Code and which was directly discreditable to the armed services. It would be therefore conduct violating article **134.**

The Court of Military Appeals remanded the case of ***United States v. Huff***[7] when the Government conceded that the specification for disobedience of a lawful order in violation of article 92 did not state an offense. The specification in question alleged in part that the accused "did fail to obey an order of. . . to stand at attention and stop moving around." As there was no allegation of the accused's knowledge of the order, his duty to obey it, or any facts from which these two elements could be implied, the specification did not state an offense.

United States v. Tindoll[8] involved four specifications of taking

[6] 15 U.S.C.M.A. 510, 36 C.M.R. 8 (1965).
[7] 15 U.S.C.M.A. 549, 36 C.M.R. 47 (1965).
[8] 16 U.S.C.M.A. 194, 36 C.M.R. 350 (1966).

indecent liberties with a female under the age of sixteen. The specifications in question alleged that accused did "take indecent liberties with the body of a female under sixteen years of age, by kissing her on the mouth with intent to gratify [his] sexual desires." Appellate defense counsel urged that these specifications alleged no offense, as kissing itself is not indecent. The Court of Military Appeals held that while the act of kissing a child may not be criminal, the additional allegation that the act was indecent and with intent to gratify sexual desires excluded any possibility that the act could be other than indecent. The specifications were held to be legally sufficient.

In the case of ***United States v. Caudill,***[9] the issue on appeal was whether certain specifications alleged the offense of forgery. Those specifications followed the sample specifications in appendix 6*c,* Manual for Courts-Martial, United States, 1951,[10] except that they omitted the allegation "with intent to defraud." The Government contended that the specifications alleged intent to defraud "by fair implication." The Court of Military Appeals rejected this argument saying the intent was not implied in the specifications. The allegations that the accused altered the checks in question knowing them to be falsely made, and to the legal prejudice of another if genuine, were "merely statements of other essential elements of the offense" which could not take the place of another essential element.

2. *Unsworn Charges.*

Article 30 of the Code requires that all charges and specifications be signed "under oath." Appellate defense counsel in ***United States v. Koepke***[11] argued that this meant a formal swearing ceremony. The charges and specifications and accompanying affidavits in this case were signed by the appropriate squadron commanders and witnessed by assistant administrative officers. Both commanders had testified that they understood as accusers they were signing the charge sheet under oath and attesting they were persons subject to the Code, had investigated the charges, and were satisfied that the charges should be brought. The administrative officers acted in their official capacity, with the understanding they were performing a notarial act. The Court of Military Appeals urged that the customary procedure outlined in the Manual be followed, but decided that the facts and circum-

[9] Hereafter called the Manual and cited as MCM.
[10] 16 U.S.C.M.A. **197,** 36 C.M.R. 353 (1966).
[11] 15 U.S.C.M.A. **542,** 36 C.M.R. **40** (1965).

stances in this particular case were sufficient to characterize and evidence the acts as an oath.

In *United States v. Taylor,*[12] the accused was convicted by a special court-martial of several charges, some of which were unsworn. The majority opinion of the Court held that the failure of the lay defense counsel to object to trial on unsworn charges constituted waiver of nonprejudicial error. Judge Ferguson dissented, stating that the doctrine of waiver should not be applied to special court-martial cases when the accused is represented by a nonlawyer counsel.

3. Duplicity.

The Court was required to examine article 109 in the case of *United States v. Collins.*[13] The Court held the article to proscribe all damage arising in a single transaction as a single offense. The facts indicated that two separately owned items in separate rooms of the same refreshment stand had been damaged. It was held that these facts supported the conclusion that the events occurred in a single place in a single transaction. All damage had to be alleged as part of one offense.

United States v. Davis[14] presented the case of an accused wrongfully obtaining casual payments from Army finance officers at three widely scattered Army bases within a four-month period with the same altered records. The Government argued that the accused's conviction of larceny for all three offenses was justified as a "single course of conduct." The Court of Military Appeals reversed the case holding that one specification for these offenses was duplicitous. These were obviously three separate offenses and should have been charged as such.

4. Reference to Trial.

In *United States u. Simpson,*[15] the question arose whether a convening authority must refer a case to a specific court. The convening authority referred the case to trial by "the special court-martial appointed by my appointing order." There were three functioning courts-martial and it was the practice of the trial counsel to assign the case to that court next scheduled to meet after the defense indicated that it was prepared to go to trial.

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[12] 15 U.S.C.M.A. 565, C.M.R. 63 (1965).
[13] 16 U.S.C.M.A. 167, 36 C.M.R. 323 (1966).
[14] 16 U.S.C.M.A. 207, 36 C.M.R. 363 (1966).
[15] 16 U.S.C.M.A. 137, 36 C.M.R. 293 (1966). *Accord,* United States v. Frenze, 16 U.S.C.M.A. 244, 36 C.M.R. 400 (1966).

The Court of Military Appeals concluded that the practice was contrary to the requirement that the convening authority designate a particular court-martial in the order of reference. Thus, there was error present but it was not prejudicial error because the practice operated as a means enabling the defense counsel, rather than the trial counsel, to choose his own court for a particular case.

5. Amendments.

United States *v. Arbic*[16] examined the effect of alterations to a charge and specification. The accused absented himself from his unit on 15 August 1962. On 10 January 1964 while the accused was absent, charges alleging desertion were properly sworn. The summary court-martial convening authority received the charge sheet on 17 January 1964 and the statute of limitations was tolled. On 19 August 1965 accused was informed of the pending desertion charge. A problem arose, however, when on 24 September 1965 the convening authority amended the charge and specification to absence without leave from 15 August 1962 to 10 August 1965. Citing United States *v. Krutsinger*,[17] article 34 of the Code, and paragraph 33d of the Manual, the Court of Military Appeals decided that amendments are perfectly valid in certain situations and each case must stand on its own facts. Here the offense of absence without leave was a lesser included offense of desertion satisfying the requirements of paragraph 33d of the Manual. Also, the tolling of the statute of limitations was within the time prescribed by article 43 of the Code for both desertion and absence without leave. Accordingly, the amendment was valid.

B. PRETRIAL ADVICE TO CONVENING AUTHORITY BY THE STAFF JUDGE ADVOCATE

The appellant in United States *v. Lawson*[18] contended he was prejudiced by inadequacies in the staff judge advocate's pretrial advice. A charge of homicide by culpable negligence had been placed against him prior to trial, resulting from his demonstration to the 11-year-old victim and others of the breakdown of his M-16 rifle in the victim's home. The weapon fired, and a bullet pierced the boy's heart. The article 32 investigating officer and the battalion commander both recommended that the charge be reduced to negligent homicide under article 134 and tried by

[16] U.S.C.M.A. 292, 36 C.M.R. 448 (1966).
[17] 15 U.S.C.M.A 235, 35 C.M.R. 207 (1965).
[18] 16 U.S.C.M.A. 260, 36 C.M.R. 416 (1966)

general court-martial. The staff judge advocate's advice to the convening authority, while it noted the recommendations for trial by general court-martial, failed to mention the recommendations for reducing the charge. The Court of Military Appeals held that the staff judge advocate's advice was not a mere formality but instead was an important pretrial protection for the accused. Since it was reasonably likely that with proper advice the convening authority might have referred to trial only a charge of negligent homicide, the conviction was reduced to one for negligent homicide and the sentence was ordered to be reassessed.

C. *AUTHORITY TO CONVENE COURTS-MARTIAL*

United States ***v. Ortiz***[19] was tried by a special court-martial convened by the Commanding Officer, 2d Bridge Company, 4th Force Troops, Fleet Marine Force, Atlantic. On appeal the accused contended that the Commanding Officer of the 2d Bridge Company had no authority to convene the special court-martial that tried him. The Court of Military Appeals observed that the 2d Bridge Company was a separate company with an authorized strength of 170 men, including five officers and one warrant officer. It had been designated a separate detached command by the Commanding General, Force Troops, who attempted to authorize the company to convene special courts-martial by a letter pursuant to the authority of article 23(a) of the Code. The Court of Military Appeals looked to that article and reasoned that the 2d Bridge Company did not have the authority to convene special courts-martial. Article 23(a)(6) of the Code says "the commanding officer of any separate or detached command or group of detached units of any armed forces placed under a single commander for this purpose" shall have the authority to convene a special court-martial. However, the Court of Military Appeals said that article 23(a)(6) must be read in light of article 23(a)(5) which gives the authority to the commanding officer of any Marine brigade, regiment, detached battalion, or corresponding unit, "Corresponding unit" was held to mean corresponding in size to a battalion. In addition, the Court gleaned from the legislative history of article 23 that separate company sized units were not intended to have special courts-martial jurisdiction in the absence of a specific grant of authority from the Secretary concerned under article 23(a)(7). The commander of the company was held to have been powerless to convene a special court-martial.

[19] 15 U.S.C.M.A. 505, 36 C.M.R. 3 (1965). *Accord,* United States v. King, 16 U.S.C.M.A. 142, 36 C.M.R. 298 (1966).

It was alleged in ***United States v. Surtasky***[20] that the Head, Military Personnel Department of the Norfolk Naval Station, lacked the authority to convene special courts-martial. The Secretary of the Navy had authorized the Commanding Officer of the Naval Station to place all enlisted personnel under the command of the "Head" for disciplinary purposes. The Court of Military Appeals said in dismissing the accused's contention, that although the "Head" was severely limited in areas which were normally command responsibilities, the restrictions on the indicia of command did not limit his power to appoint special courts-martial. The Court also stated that it cannot review the formula evolved to meet administrative needs in setting up military command structures except where improper influence is exerted by a superior authority upon a subordinate commander in the exercise of his judicial power.

The limited scope of the holding in the *Ortiz*[21] case was emphasized in ***United States v. Woodward.***[22] Here the issue was whether the Commanding Officer, 3d Engineer Battalion(Rear), 3d Marine Division, Fleet Marine Force, had special courts-martial appointing authority. The unit was composed of 419 men, including 19 officers. The Court found that the organization in question fitted into the definition of "detached battalion, or corresponding unit" or that of "separate or detached command" found in article 23(a)(5) and (6) of the Code. The fact that it existed as a separate entity and reported directly to a major headquarters exercising general courts-martial jurisdiction was also considered important in concluding the commanding officer of the unit possessed the questioned authority.

D. *COMMAND INFLUENCE*

The difficult proposition of command influence was at issue in ***United States v. Albert.***[23] Accused contended on appeal that prejudicial error resulted from a lecture given by the Staff Judge Advocate of Fort Devens, Massachusetts, to officers at the post, five of whom sat on the seven-man general court-martial which tried the defendant. Among other points, the speech discussed the effects and administrative ramifications of certain sentences. It noted, for instance, that a punitive discharge with no confinement or forfeitures left the accused and the Army in a poor position and

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[20] 16 U.S.C.M.A. 241, 36 C.M.R. 397 (1966).
[21] United States v. Ortiz, 15 U.S.C.M.A. 505, 36 C.M.R. 3 (1965).
[22] 16 U.S.C.M.A. 266, 36 C.M.R. 422 (1966).
[23] 16 U.S.C.M.A. 111, 36 C.M.R. 267 (1966).

was likely to lead to trouble. Confinement without forfeitures was cited as being inappropriate. A sentence of confinement at hard labor and reduction to an intermediate grade was noted as being "inconsistent." Throughout these comments and others of the same nature, the staff judge advocate decisively emphasized several times that he did not wish to be charged with command influence, that he did not wish to be misunderstood, and that determination of the sentence was the responsibility of the court members alone. Although court members need not be bothered with the administrative problems associated with sentences, the Court of Military Appeals concluded that looking at the speech as a whole this was not an exhortation for more severe sentences or for inclusion of each type of penalty in every sentence. Also, the fact that the accused had received a lenient sentence somewhat below the maximum imposable was cited as indicating the lack of influence upon the court members by the staff judge advocate's lecture.

Judge Ferguson strongly dissented feeling there was obvious command influence. He stated that article 37 of the Code was rendered ineffective by this decision except in the most aggravated cases.

E. *PLEAS AND MOTIONS*

1. *Pleas of Guilty.*

United States *v.* ***Walter***[24] concerned a stipulation of fact and whether because of it the accused's guilty plea to wrongful sale of government property was improvident. The stipulation admitted that the accused, after being approached by some Koreans, had taken false paperwork prepared by the Koreans, turned it in, and received some government property. Upon delivery of the property to the Koreans, they gave him a sum of money. The Court said that a stipulation of fact must conflict with accused's plea of guilty and show his judicial confession is inconsistent with the facts agreed upon by the parties to render the plea improvident. Here the evidence showed the accused was guilty of stealing government property with the aid of forged issue slips but there was no evidence that the property had been sold. The defendant had received money for his services, not for the goods. Thus the stipulation, while admitting larceny, negated his guilt as to the wrongful sale.

The question of an improvident plea was also raised in ***United***

[24] 16 U.S.C.M.A. 30, 36 C.M.R. 186 (1966).

States v. Chancelor.[25] There the accused had pleaded guilty in a special court-martial to issuing a worthless check, but in a post trial clemency interview declared he thought he had sufficient funds in the bank to pay the check when he drew it. The Court of Military Appeals reviewed the trial and found that upon accused's plea of guilty the president had read to him the formula advice of appendix 8*a,* page 509, of the Manual. The case was reversed. The president's advice to the accused was defective because it lacked any explanation of either the elements of the offense or the fact that by pleading guilty the accused admitted writing the check with intent to defraud. The formula procedure used by the president offered no real opportunity for disclosure of accused's motivation for pleading guilty or whether he had any genuine understanding of the admission expressed in his plea as to the elements of the offense charged. The Court pointed out that the reversal did not have the effect, as the Government argued, of permitting accused to plead guilty in all cases and thereafter, at his pleasure, "negate its effects by simple post trial declarations of innocence if he is ultimately displeased at the result." On the contrary, here accused had maintained his innocence all along except for his plea, and no real examination into the matter had been made.

The Court of Military Appeals also found a plea of guilty to be improvident in ***United States v. Holladay.***[26] Although accused pleaded guilty during an out-of-court hearing, he stated he had absolutely no recollection of the offense, that he had never before committed such acts and was not so inclined, and that all he knew about the alleged offense was what he heard at the article **32** hearings. In addition, the record revealed that the accused twice professed innocence after the hearing. The Court reasoned that the accused "rejected guilt through the entire investigation, trial, and review process of this case, the single exception being the pretrial agreement that has been totally disavowed."

2. Mistrial.

The accused in ***United States v. Simonds***[27] was convicted **of** intentional infliction of grievous bodily harm. The facts indicate that either the accused or an Airman Moore, or both, had committed the offense. The main issue in the case was whether the law officer should have probed more deeply than he did into

[25] 16 U.S.C.M.A. 297, 36 C.M.R. 453 (1966).
[26] 16 U.S.C.M.A. 373, 36 C.M.R. 529 (1966).
[27] 15 U.S.C.M.A. 641, 36 C.M.R. 139 (1966).

the effect on the court of a sheet of paper seen by the president and one other court member. It contained the text of charges alleging that Airman Moore had committed an assault upon the victim at the same time as that alleged in the charges against Simonds. The trial defense counsel made no objection and indicated that his strategy was to show that Airman Moore rather than the accused stabbed the victim. The Court of Military Appeals affirmed the conviction indicating that the law officer did not err. A sua sponte declaration of a mistrial was not needed. Of the two people seeing the document the president had only read part of it and he said he had not formed an opinion upon the basis of what he read. Also, the victim had already testified that Moore had assaulted him and the defense counsel had not objected at trial.

3. Continuances.

During a pretrial investigation in ***United States v. Nix,***[28] the defense counsel sent a written request to the convening authority for a psychiatric evaluation of the accused. This was approved and sent to the base hospital where the order was not complied with. At trial the law officer denied the defense counsel's motion for a continuance so that the evaluation could be accomplished. The Court of Military Appeals, in reversing the case, pointed out that paragraph 121 of the Manual allows the defense counsel to petition for such an evaluation. If the convening authority approves the request, it must be complied with. This is a matter of judicial rather than medical determination. In ***United States v. Dobson29*** the Court invoked the doctrine of waiver where it appeared that the trial defense counsel, under somewhat similar circumstances, did not seek relief before the law officer.

F. *CONDUCT OF THE TRIAL*

1. *Voir Dire Examination.*

During the voir dire examination in ***United States v. Sutton,***[30] the defense counsel asked a court member if he would convict the accused should he find a reasonable doubt in the case. The law officer quickly stopped the questioning saying the defense counsel was improperly going into the law of the case. He then instructed the court to listen carefully to each question proposed by the defense counsel to insure they understood them. The Court of Military Appeals reversed the case, indicating the law officer had

[28] 15 U.S.C.M.A. 578, 36 C.M.R. 76 (1965).
[29] 16 U.S.C.M.A. 236, 36 C.M.R. 392 (1966).
[30] 15 U.S.C.M.A. 531, 36 C.M.R. 29 (1965).

arbitrarily curtailed the accused's voir dire. The question asked by the defense counsel was proper and by the law officer's words of caution he had given the court members the idea that defense counsel was trying to entrap them.

During voir dire, the defense counsel in United States *v. Fort*[31] asked the collective court panel if any member felt that a punitive discharge was required in a sentence imposed for the assault of a 60-year-old female with an intent to gratify sexual desire. The law officer interpased himself and, after some discussion during which the question was answered and two members indicated some inclination in that direction, the law officer held the question to be improper. However, he permitted counsel to "question the members individually." Defense counsel did not proceed further and did not object to the ruling. The Court, through Chief Judge Quinn, held that the law officer's ruling that voir dire be conducted individually was "appropriate" under the circumstances and without error in this case.

2. Common Trial.

The two accused in United States *v. Tackett*[32] received a common trial, with the same defense counsel, for violation of a general order and rape. The testimony of one accused and the pretrial statement by the other accused, who did not testify, presented defenses which were inconsistent. In addition, the trial counsel repeatedly invited the Court to compare the one accused's testimony with the other's pretrial statement, notwithstanding instructions that the statement should be considered only as to the accused who made it. Because of these facts, the Court of Military Appeals reversed the conviction asserting that the accused had not received a fair trial.

3. Right *to* Counsel.

At the article **32** investigation in United States *v. Mitchell*[33] accused requested representation by a named captain. This request was not granted because of the captain's unexplained nonavailability. **A** first lieutenant, a qualified attorney, was appointed. No objection to the nonavailability of requested counsel was raised at the article **32** investigation or at trial. The Court of Military Appeals held that since the issue was not raised at trial it was deemed waived and the findings and sentence affirmed. The

[31] 16 U.S.C.M.A. 86, C.M.R. 242 (1966).
[32] 16 U.S.C.M.A. 226, 36 C.M.R. **382** (1966).
[33] 15 U.S.C.M.A. 516, 36 C.M.R. 14 (1965).

Cutting[34] case was distinguished, for there the issue of the unexplained nonavailability was raised at trial

4. *General.*

Accused pleaded not guilty to desertion but was found guilty in *United States v. Pratt.*[35] The Court of Military Appeals found prejudicial error where, during the trial, several court members departed from their role of objective finders of fact and instead assumed the task of prosecuting the accused. Three members of the court elicited from the accused incriminating statements that he had forgotten how to position his brass on his uniform; that he had made a job application for permanent rather than temporary employment; and how the accused lost his military identification card. The Court held that the members' examination of the accused convincingly established that they abandoned their impartiality and sought to perfect the prosecution's case.

The accused in *United States v. Warborg*[36] pleaded guilty and was convicted of three specifications of absence without leave and one of larceny. At the outset of the special court-martial, the trial counsel inquired of the court members whether they were aware of any fact which would constitute a ground for challenge. Two members said they were, mentioned three separate prior offenses committed by the accused, and were then excused. However, at the appropriate place in the trial the trial counsel indicated he had no evidence of prior convictions. As no limiting instructions were given, due to the improper disclosure of prior misconduct by the excused members, the Court Military Appeals reversed the case.

Throughout the trial of *United States v. Lewis*[37] the trial counsel, an Air Force lieutenant colonel and staff judge advocate of the accused's base, and the defense counsel, a retired Army judge advocate colonel, argued and verbally lambasted each other. Many bitter exchanges ensued and the court members heard several prejudicial remarks such as the fact that the trial counsel could have charged the accused with other offenses, that the accused had'pleaded guilty to similar charges in a civilian court, and that the accused had unsuccessfully attempted to negotiate a guilty plea. The Court of Military Appeals concluded that the accused was deprived of a fair hearing. They pointed out that

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[34] United States v. Cutting, 14 U.S.C.M.A. 347, 34 C.M.R. 127 (1964).
[35] 15 U.S.C.M.A. 558, 36 C.M.R. 56 (1965).
[36] 16 U.S.C.M.A. 32, 36 C.M.R. 188 (1966).
[37] 16 U.S.C.M.A. 145, 36 C.M.R. 301 (1966).

counsel for both sides seemed more interested in attacking each other than in trying the accused. The Court also reprimanded the law officer, stating that it was his duty to exercise control over the proceedings.

5. Closed Sessions.

A president of a special court-martial called an out-of-court hearing in ***United States v. Baca***[38] to determine whether the testimony of a criminal investigator would be heard over defense counsel's objection. During the hearing the president read a document produced by the trial counsel which contained a confession by the accused to one of the charges. The president even remarked that he was impressed by the confession. The document was, however, not introduced into evidence and no mention was made of it during the rest of the trial. The Court of Military Appeals pointed out that out-of-court hearings are not authorized in special courts-martial. The fact that the president had read the confession of the accused, which was not introduced into evidence, resulted in prejudicial error. The president was also a court member and later voted on the guilt or innocence of the accused.

In ***United States v. Manuel,***[39] the accused was charged with assault with intent to commit murder for shooting his victim in the back of the head causing brain damage and permanent loss of visual acuity. He pleaded guilty to assault with a dangerous weapon but was found guilty of assault whereby grievous bodily harm was intentionally inflicted. The court had deliberated for some time when the law officer and reporter were called into a 13-minute closed session. During this session the president stated they had found the accused guilty of aggravated assault with intent to inflict grievous bodily harm under article **128** of the Code. The law officer responded by showing the president how to fill out the findings worksheet for intentionally inflicting grievous bodily harm. The president also stated during the session that they had not voted on the grievous bodily harm. The Court of Military Appeals affirmed the conviction stating that the law officer did not attempt to influence the findings and that although the president indicated no separate vote had been taken upon the nature of the bodily harm, there was no doubt but that the members understood the damage to be that to the victim's brain and vision.

Judge Kilday concurred in the result but noted the difference between the military and civilian practice as to closed sessions.

[38] 16 U.S.C.M.A. 311, 36 C.M.R. 467 (1966).
[39] 16 U.S.C.M.A. 357, 36 C.M.R. 513 (1966).

Judge Ferguson dissented on the grounds it was prejudicial error for the law officer to render his assistance because the court had not yet reached a valid finding. He also stated there was no such offense as assault with intent to inflict grievous bodily harm and that the law officer had converted the finding to one of assault whereby grievous bodily harm was intentionally inflicted.

6. Adequacy of Counsel.

Accused was convicted by a general court-martial of premeditated murder and sentenced to death. However, the board of review reduced the sentence to life imprisonment. On appeal the defense counsel in ***United States u. Wimberley***[40] contended, among other things, that accused was inadequately represented at trial. The record revealed that accused was examined by psychiatrists before the offense and by a board of medical officers. No evidence of mental disorder was found. After the trial, expert opinion was obtained which tended to establish that the accused was insane. The Court of Military Appeals held that the failure to raise the issue of mental responsibility at the trial did not indicate inadequate representation. There was substantial evidence to the effect that he was not insane and the defense counsel could not be expected to conduct an exhaustive search to find someone who was willing to testify he lacked the necessary mental responsibility. The other assertion of inadequate representation arose from the fact that after waging a tremendous legal battle on the merits, once accused was convicted defense counsel did not enter any extenuation or mitigation, nor did he argue as to the sentence. The Court suggested the law officer should have called an out-of-court hearing to obtain counsel's reasoning on the matter, but since the board of review had reduced the sentence of life imprisonment, the only other sentence the court-martial could have adjudged for premeditated murder, there was no prejudice to the accused.

The trial defense counsel in ***United States u. Mitchell***[41] was held to have inadequately represented his client when he conceded in closing argument on sentence that a punitive discharge would be appropriate. Noting that defense counsel is not an ***amicus*** of the court, the Court of Military Appeals concurred with the board of review that this was inadequate representation. The Court did not agree with the Government that the reduction of the period of confinement by the board purged the error. Since the inadequacy

[40] 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).
[41] 16 U.S.C.M.A. 302, 36 C.M.R. 458 (1966).

ran to the adjudication of a discharge, the decision of the board was set aside and the case returned to a board which may either "affirm a sentence which does not include a bad conduct discharge or it may order a rehearing as to the entire sentence."

In ***United States v. Hampton,***[42] the defense counsel conceded in his argument on findings that, contrary to the plea of not guilty, the prosecution had established guilt beyond a reasonable doubt. This was held to be prejudicially erroneous. It was tantamount to the entry of a plea of guilty. The Court indicated that, at the very least, inquiry into the consent of the accused to this and his understanding of its meaning and effect were required.

7. *Appointment and Relief of Members.*

After arraignment in ***United States v. Metcalf***[43] the president of the special court-martial called a recess. Upon reconvening, the president had been relieved. **A** letter, attached to the record by the convening authority, contained an affidavit by the president. This inclosure explained that the convening authority had excused the first ,president because of prior knowledge in the case. In his opinion Judge Ferguson discussed article 29 of the Code and asserted that it was no substitute for the challenging procedure. He explained that prior knowledge of the case is no grounds for challenge until the matter is explored for its extent and effect. Thus the president's removal was erroneous. The opinion further noted that even had article 29 been applicable here the procedure used was unsatisfactory. The utilization of that procedure envisions a critical situation which is fully explained in the record. That could not be accomplished by inclusion in the record of an ex parte statement.

8. *Challenges.*

In ***United States v. Schmidt,***[44] four members of a seven-man general court-martial were challenged for cause. The three remaining members proceeded to separate themselves from the challenged four and acted at one time to overrule all four challenges. The Court of Military Appeals held that voting on all four challenges at the same time was error but not fatal as the accused had pleaded guilty, thus waiving irregularities in procedure. **As** to the main issue of whether the court-martial lacked jurisdiction to continue when four members were challenged, the Court reasoned

[42] 16 U.S.C.M.A. 304, C.M.R. 460 (1966).
[43] 16 U.S.C.M.A. 153, 36 C.M.R. 309 (1966).
[44] 16 U.S.C.M.A. 200, 36 C.M.R. 356 (1966).

that the court-martial did not lose jurisdiction. When a member is challenged he temporarily stands aside but is still counted as a member as far as enabling the court-martial to proceed. Thus article 29(b) of the Code, which says that a trial may not proceed when membership is reduced below five, was not violated.

During the voir dire examination in ***United States*** u. ***Tucker,***[45] the defense counsel asked the president of the court and two other members if they felt that they had to vote for confinement no matter what mitigating evidence would be offered, since accused had pleaded guilty to eleven offenses of larceny and housebreaking. They all answered in the affirmative. The defense counsel then challenged the president for cause. Instead of instructing the court on the procedure for challenges, the law officer called an out-of-court hearing. He indicated to counsel at that time he felt this was not a valid challenge and as a result preferred not to submit the matter to the court. This procedure was held to be erroneous by the Court as it is the court's duty to determine the merits of a challenge for cause, not the law officer's. However, there was no prejudice as to the findings in this case as the accused had pleaded guilty.

IV. MILITARY CRIMINAL LAW

A. *SUBSTANTIVE OFFENSES*

1. *Assault.*

In ***United States*** u. ***Ompad,***[46] the Court of Military Appeals held it not to be multiplicious pleading to allege two specifications of assault where a clear-cut interval of uncertain duration passed between the two incidents and during this interval the accused had to follow the victim into his barracks wherein he committed the second assault. These factors "compellingly indicate the second assault was a new and separate act."

2. Conspiracy.

Accused was convicted by a general court-martial for conspiracy in ***United States*** u. ***Fisher***[47] The issue on appeal was whether reversal of the conviction was required because the only other alleged co-conspirator was acquitted on the merits. The solution to the problem was complicated by the fact that although both men were charged with the same conspiracy, both were also

[45] 16 U.S.C.M.A. 318, 36 C.M.R. 474 (1966).
[46] 15 U.S.C.M.A. 593, 36 C.M.R. 91 (1966).
[47] 16 U.S.C.M.A. 78, 36 C.M.R. 234 (1966).

charged with different overt acts to accomplish the conspiracy. This was held not to matter since the same conspiracy was charged and the man acquitted was the only other alleged conspirator. Accordingly, conviction was reversed.

3. Forgery.

United States *v. Caudill*[48] concerned the offense of forgery. The Court of Military Appeals held that the deletion of the phrase "with intent to defraud" from the specification was fatal. This is an essential element of the crime and could not be inferred from the rest of the specification.

In ***United States*** *v. Pelletier,*[49] the law officer gave instructions requiring the absence of the intent to defraud to be honest. The Court of Military Appeals reiterated that the offense required only an intent to defraud without further qualifications. Examining the effect of the erroneous instruction, the Court found prejudicially inconsistent standards in the instructions as a whole. This necessitated reversal.

4. Larceny.

The Court of Military Appeals found in ***United States*** *v. Satey*[50] that the law officer improperly instructed the court on the offense of larceny. Accused was charged with larceny from the Government by use of a petty cash fund in contravention of regulations. After initially instructing the court correctly as to the necessary intent involved, the law officer proceeded to give an instruction that eliminated the specific intent from the necessary elements of larceny. The instructions, in effect, told the court that the expenditure of fund monies in violation of regulations constituted larceny. While it is true that an accused need not in every case personally benefit from the conversion of funds, he must intend to permanently deprive someone of the use and benefit of the property. This element was missing in these instructions as they would render him guilty even though the Government received all the benefit from the use of the monies.

In ***United States u. Windham,***[51] the accused was convicted **of** a specification which alleged that he stole **64** checks with a total face value of **$1,292.34** payable to the Treasurer of the United States. It was argued that the checks were but evidence of indebtedness which had, under common law, no value other than

[48] 16 U.S.C.M.A. 197. 36 C.M.R. **353** (1966).
[49] 15 U.S.C.M.A. 654, 36 C.M.R. 152 (1966).
[50] 16 U.S.C.M.A. 100, 36 C.M.R. 256 (1966).
[51] **15** U.S.C.M.A. 523, 36 C.M.R. 21 (1965)

that of scrap paper. The Court rejected this argument and explained that the value of the item taken is the legitimate market value rather than the benefit realized by the thief.

In another case, accused was convicted of larceny for stealing U.S. Government checks drawn to named payees from his company's mail room. On appeal, the accused's attorney claimed unsuccessfully that as the checks were undelivered they were without effect as commercial paper and of negligible value. The Court of Military Appeals in *United States v. Buchhorn*[52] cited the *Real*[53] case as authority for the proposition that the addressee can properly be alleged as the owner in an article 121 prosecution for theft of letter contents, because the addressee of regular mail matter has the right to possession thereof as against other persons. Its value to the addressee is at least the market value, and in the case of a check, the face value.

Accused, while serving in Europe, had been reduced by a summary court-martial from sergeant to corporal. During his rotation to the United States, he deleted all references in his service and pay records to the court-martial and reduction. With these altered records he obtained casual payments from Army finance officers at three widely scattered Army bases within a four-month period. In *United States v. Davis*,[54] the Government argued on appeal that accused's conviction for one specification of larceny for all three offenses was justified as a "single course of conduct." The Court of Military Appeals reversed the case revealing that one specification for these offenses was duplicitous. These were obviously three separate offenses and should have been charged as such.

5. *Dereliction of Duty.*

In the case of *United States v. Kelchner*,[55] a naval commander was dismissed from the service for dereliction of duty. Although the Court of Military Appeals reversed the conviction because of a lack of evidence, the opinion noted that the law officer erred when he refused a defense motion to make the specification[56] more

[52] 15 U.S.C.M.A. 556, 36 C.M.R. 54 (1965).
[53] United States v. Real, 8 U.S.C.M.A. 644, 25 C.M.R. 148 (1958).
[54] 16 U.S.C.M.A. 207, 36 C.M.R. 363 (1966).
[55] 16 U.S.C.M.A. 27, 36 C.M.R. 183 (1966).
[56] *Id.* at 28, 36 C.M.R. at 184. "In that. . . [the accused] was . . . derelict in the performance of his duties as the Senior Member of an Aviation Information Team, in that he negligently failed adequately to supervise and assist in the work of procurement then being performed by . . . at Oklahoma State University, Stillwater, Oklahoma, and at the University of Oklahoma, . . . as it was his duty to do."

specific. The Court noted that the specification contained no hint of the nature of the duty required of the accused. Since "inadequate" performance could result through ineptness which is not a part **of** dereliction of duty, the allegation of dereliction because of a failure to "adequately supervise" was not specific enough to withstand the motion.

6. ***Disobedience of Orders.***

The issue in *United States v. Chunn*[57] centered around the authority of the Commander, U.S. Naval Base, Subic Bay, Republic of the Philippines, to issue a lawful general order. The board of review decided he did not possess such authority, basing their decision upon the fact that the Naval Base was a fourth echelon command below the Chief of Naval Operations. The Court of Military Appeals disagreed, saying that many factors must be considered in determining if the authority exists and only one is the position in the hierarchy **of** military command. Here although only a fourth echelon command, the base was one of the three largest operating bases in the Western Pacific. In addition, the base had many difficult, important missions, had many components under its jurisdiction, and had a commander who was a flag officer with general court-martial jurisdiction. All of these factors added up to the conclusion that the base had a position of such importance as to enable it to promulgate general orders.

7. Worthless Checks.

The Court **of** Military Appeals announced that it would not be a vehicle for the enforcement of gambling debts in ***United States u. Wallace.***[58] This decision was based on a case where the accused had written many bad checks to obtain coins to operate the slot machines in the Murnau, Germany, officers' open mess. The Court held, in refusing to sustain accused's conviction, that whether gambling was legal or illegal was irrelevant because any transactions involving it are against the public policy and would not be judicially enforced.

8. Unlawful Entry.

Can a soldier's locker be the subject of unlawful entry under article **134 of** the Code? This was the unique question decided in the negative by the Court in ***United States u. Breen.***[59] The Court

[57] 15 U.S.C.M.A. 550, 36 C.M.R. 48 (1965).
[58] 15 U.S.C.M.A. 650, 36 C.M.R. 148 (1966).
[59] 15 U.S.C.M.A. 658, 36 C.M.R. 156 (1966).

felt that the offense is similar to housebreaking and should be limited to real property or at least a form of personal property normally used for storage or habitation. Also, this offense should not be extended to every sort of property, even though used for storage purposes. The decision left an "out," so to speak, for future prosecution of the offense under article 121 or under article 134 for rummaging in a locker. In a dissent, Judge Quinn remarked that a locker is used for storage of equipment and personal effects and is in a very real sense part of the soldier's "home,"

9. *Extortion.*

Accused was convicted by a general court-martial for extortion and wrongful communication of a threat in ***United States v. Schmidt***[60] for handing his commanding officer a document which alleged that accused would give an article to the newspapers telling of his unjust punishment for writing his congressman, if he received any disciplinary action before a certain date. The facts were in dispute but suffice it to say that there was a possibility that the accused was being given nonjudicial punishment because he had written his senator. The Court of Military Appeals limited its decision to the particular facts of the case but proceeded to reverse the conviction because it did not "comport with the fairness, integrity, or public reputation of judicial proceedings."[61] The Court noted that although normally the reason for committing extortion is no defense, wrongful intent is necessary for culpability and that is affected by the attendant circumstances. The Court also stated that while, as a general rule, intent is a matter of fact and should be submitted to the jury, a reviewing body can look at the matter if it feels the verdict is wrong, unjust, or has been rendered as a result of a misconception of the law.

10. *Riot.*

The *Metcalf*[62] case was also illuminating for its discussion of the offense of rioting. The facts of that case showed that a group of men and women were strolling along from the enlisted men's club to the women's barracks. A car pulled up along side of them, at least four men departed, and started raining blows on the group. Bystanders came to help the group and the assailants ran off. The Court of Military Appeals looked to the common law definition of riot and concluded one essential element of that crime was

[60] 16 U.S.C.M.A. 57, 36 C.M.R. 213 (1966).
[61] *Id.* at 61, 36 C.M.R. at 217.
[62] "United States v. Metcalf, 16 U.S.C.M.A. 153, 36 C.M.R. 309 (1966).

lacking. This was the terrorization of the public in general. This encounter was too brief and lacked the violent and turbulent character of a riot. The Court limited any rehearing to charges for a joint assault or breach of the peace.

11. *Unlawful Homicide.*

The accused was convicted of unpremeditated murder under article 118(3) of the Code in ***United States u. Hartley***[63] for killing another soldier with a .22 calibre Derringer. The factual situation surrounding the killing was involved but suffice it to say that the accused committed several dangerous acts including carrying the piston, loading it, cocking it, and pulling the trigger. Realizing this, the defense counsel asked the law officer to instruct the court that, in order to convict the accused of murder while engaged in an inherently dangerous act under article 118(3), they must find that the accused "knowingly and deliberately intended to pull the trigger." Article 118(3) of the Code requires that death result from an intentional act of the accused. The law officer refused the suggested instruction and instead instructed generally without specifying what act or acts the court must find were deliberately committed by the accused. The Court of Military Appeals agreed with the defense counsel and reversed because the instructions given were not precise enough.

In ***United States u. Moore,***[64] the accused testified that he did not intend to kill or injure the victim when he fired his rifle and killed him. Moore testified that, because of fear of a possible ambush, he intended tc fire ahead of the victim to prevent the escape of the victim from the room. The law officer instructed on unpremeditated murder and voluntary manslaughter. He did not instruct on involuntary manslaughter. The accused was convicted of unpremeditated murder and appealed. The Court reasoned that the accused's testimony set in issue a circumstance whereby death resulted from an assault with a dangerous weapon without intent to inflict grievous bodily harm. This supports a finding of guilty of involuntary manslaughter and necessitates a sua sponte instruction. Since this was not done, the case had to be reversed and returned with a rehearing authorized.

In ***United States u. Bellamy,***[65] the accused was convicted of unpremeditated murder. The board of review set aside the findings and the sentence because the law officer failed to specifically instruct that, with respect to the accused's ability to distinguish

[63] 16 U.S.C.M.A. 249, 36 C.M.R. 405 (1966).
[64] 16 U.S.C.M.A. 375, 36 C.M.R. 531 (1966).
[65] 15 U.S.C.M.A. 617, 36 C.M.R. 115 (1966).

right from wrong and to adhere to the right, one of the factors to be considered was a psychiatrist's testimony based on the "policeman at the elbow" test. The Court of Military Appeals disagreed with the board saying that the "policeman at the elbow" test was raised by the evidence and was a proper matter for argument. It was but a mere facet of the overall defense of mental irresponsibility and it was not a theory in itself necessitating a separate specific instruction.

12. *Breach of Restraint While Under Correctional Custody.*

The accused was convicted of breach of restraint while under correctional custody in ***United States v. Mackie.***[66] At trial, the trial counsel proved the validity of the correctional custody by introducing a letter showing that the accused had wrongfully appropriated an automobile. This was held to be neither necessary nor permissible because it tended to give the Court an opportunity to punish the accused twice for the original offense. The other issue appealed was whether correctional custody under article 15 was valid because it, in effect, authorizes confinement which was not imposed by the sentence of a court-martial. The provisions for correctional custody were held to be a valid exercise by the Congress of its power to make rules for the government and to regulate the land and naval forces. The Court mentioned also that the commander was limited in his nonjudicial powers to cases where a court-martial was not demanded.

13. *Wrongful and Willful Damage to Property.*

The accused willfully damaged the property of two different companies. On appeal in ***United States v. Collins,***[67] the defense counsel contended that the joining of damage to two persons into one specification was prejudicial because the maximum authorized confinement became five years as opposed to one year if not combined. This argument was not heeded, however, and the Court of Military Appeals reasoned that an accidental difference in ownership cannot convert a single offense into multiple wrongs. Here the circumstances indicated a single incident or transaction and must be alleged as one offense.

14. *Indecent Liberties.*

United States v. Tindoll[68] elaborated on the possibility of the act of kissng on the mouth as consummating the offense of indecent liberties. It was held that while the act of kissing a child may not

[66] 16 U.S.C.M.A. **14, 36** C.M.R. **170 (1966).**
[67] 16 U.S.C.M.A. **167, 36** C.M.R. **323 (1966).**
[68] 16 U.S.C.M.A. **194, 36** C.M.R. **350 (1966).**

be criminal, the fact it was charged as indecent and with intent to gratify one's sexual desires completely excluded any possibility that the act could be interpreted as innocent.

15. ***Adultery.***

Is adultery a continuing offense? In ***United States v. Carter,***[69] the Court held that an allegation of a continuing offense is to be tested by whether, after looking at all the evidence, it amounts to a course of conduct. Here accused was charged with adultery over a 111-day period and defense counsel had moved to have the date made more specific or alternatively the charges dropped. The conviction was affirmed because the specification was clearly sufficient to inform the accused of the act he committed and to protect him against another prosecution for the same act.

B. *DEFENSES*

1. ***Self-Defense.***

One issue in the *O'Neal*[70] case was whether there was any evidence which would necessitate an instruction on self-defense. At trial the facts indicated that the accused had provoked a fight and during the encounter stabbed the victim. There was no evidence of the accused attempting to withdraw from the affray at any time. Because of this, the Court of Military Appeals held the law officer was correct in not instructing on self-defense. They mentioned the fact that one who starts a fight can withdraw from it in good faith and then claim self-defense, but there was no evidence of this occurring here.

United States v. Perry" illustrates how self-defense in repelling a nondeadly assault can be a defense against a charge of unlawful killing. The accused asserted tha he perceived the onslaught of a simple assault and that he employed nondeadly force—a fistic rebuff—in defense. He asserted that this unexpectedly caused the death of the victim. The Court of Military Appeals held this to be a lawful defense and necessitated an instruction. It was error for the law officer to instruct that self-defense was permitted only to save one's own life or to prevent grievous bodily harm.

The "objective-subjective" aspects of self-defense and the instructions necessitated by these aspects were the subject of several cases. ***United States v. Jackson***[72] illuminates the need for clarity in instructing on self-defense. Here the instructions contained refer-

[69] 16 U.S.C.M.A. 277, 36 C.M.R. 433 (1966).
[70] "United States v. O'Neal, 16 U.S.C.M.A. 33, 36 C.M.R. 189 (1966).
[71] 16 U.S.C.M.A. 221, 36 C.M.R. 377 (1966).
[72] 15 U.S.C.M.A. 603, 36 C.M.R. 101 (1966).

ences to the conduct of the "reasonable man'' and the "reasonable soldier." Although not held reversible error, all three opinions found the language "inartful." This was because the phrase was applied in lieu of the subjective question of whether the accused actually believed deadly force was necessary to prevent grievous bodily harm to his person.

An individual's right to defend himself with deadly force is based on apparent need and not factual need. In other words, as long as a person honestly and reasonably believes that the force is necessary, there is no criminal misconduct even if factually he did not need to use the force as a means of self-defense. For this reason, the Court of Military Appeals reversed the case of ***United States u. Burse***[73] where, along with the proper instructions, the law officer predicated the right of self-defense upon factual necessity only.

A decision of the board of review was affirmed in ***United States v. Armistead***[74] when the Court of Military Appeals held that the law officer's instructions on self-defense were adequate. The defense counsel had objected to a portion of the instructions which said that self-defense was lawful if the accused reasonably believed that the killing was necessary to save his own life. The defense counsel contended the phrase "killing was necessary" does not state the criterion for self-defense because the right to assert self-defense does not necessarily depend upon the presence of an intent to kill but depends upon an intent to use appropriate defensive force. The Court of Military Appeals held that, although one acting in self-defense need not (believe killing his attacker is necessary and need only believe that the force used is necessary, the instructions incorporating the "belief the killing was necessary'' concept are improper only where the evidence negates an intentional killing. Such instructions are appropriate where there is evidence indicating an intentional killing. As either situation was possible by the evidence presented here, the instructions were adequate when read as a whole.

In ***United States u. Vaughn,***[75] the law officer instructed that the members were to determine from various factors whether the accused's use of a gun was the use of reasonable force. This was error inasmuch as the test of force used in self-defense is subjective—"such force as (the actor) believes. . .to be necessary. . .to prevent impending injury.'' Nevertheless, the entirety of

[73] 16 U.S.C.M.A. 62, 36 **C.M.R.** 218 (1966).
[74] 16 U.S.C.M.A. 217, 36 C.M.R. 373 (1966).
[75] 15 U.S.C.M.A. 622, 36 C.M.R. 120 (1966).

the instructions given clearly conveyed the correct concept and the error noted did not make the entire charge misleading.

2. *Mental Responsibility and Capacity.*

Accused was convicted by a general court-martial of unpremeditated murder in ***United States v. Brux***.[76] At trial, the issues of the accused's mental responsibility and capacity were hotly contested. This was accentuated by an outburst by the accused which took ten men to quell. As a result, on two occasions the law officer attempted to continue the case in order to further explore the accused's mental capacity to stand trial. On both occasions the Court by majority vote overruled his decision and the trial proceeded. The Court of Military Appeals found this procedure to be correct. As a part of his instruction in the case the law officer instructed on the "policeman at the elbow" test. The Court found this to be error considering the evidence, the cruciality of the sanity issue, and the accused's bizarre trial and post trial behavior. Thus, since the issue of the accused's mental responsibility had been raised, the instructions given constituted prejudicial error. In addition, even though the defense counsel requested the erroneous instruction, the Court refused to invoke the doctrine of self-induced error in order to prevent a miscarriage of justice.

In ***United States v. Bellamy***,[77] the accused was convicted of unpremeditated murder. The board of review set aside the findings and the sentence because the law officer failed to specifically instruct that, with respect to the accused's ability to distinguish right from wrong and to adhere to the right, one of the factors to be considered was a psychiatrist's testimony based on the "policeman at the elbow" test. In disagreeing with the board, the Court of Military Appeals said that although the "policeman at the elbow" test was raised by the evidence and was proper matter for argument, it was but a mere facet of the overall defense of mental irresponsibility. It was not a theory in itself necessitating a separate specific instruction. Such a request would be similar to a request for comment on the evidence and would have emphasized the evidence for one side only.

The *Wimberley*[78] case is illustrative of how far a trial defense counsel must go in seeking to obtain expert testimony as to accused's lack of mental responsibility. In that case although several qualified individuals attested to accused's sanity prior to trial, the appellate defense counsel obtained a psychiatrist who

[76] 15 U.S.C.M.A. 597, 36 C.M.R. 96 (1966).
[77] 15 U.S.C.M.A. 617, 36 C.M.R. 115 (1966).
[78] United States v. Wimberley, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).

testified that accused lacked the necessary mental responsibility at the time of the offense. A claim of inadequate representation against the trial defense counsel was rejected on the grounds that the defense counsel, under the facts of the case, had adequately attempted to determine the accused's mental responsibility.

3. Former Jeopardy.

In *United States v. Waldron,*[79] the Government had been granted a mistrial on the same charges at an earlier trial. The issue on appeal was whether the accused's defense of former jeopardy at the second trial was meritorious. The Court of Military Appeals mentioned the general rule that the accused is protected against a second trial for the same offense when proceedings are terminated without legal justification after jeopardy attaches.

The record of trial revealed that the mistrial was called after several court members determined they had already formed opinions concerning the prosecution's first witness. The witness was on the stand at the time and the court members said they knew him as the man who had testified against someone else in an earlier court-martial.

The Court of Military Appeals concluded from the record that jeopardy had attached; therefore, the relevant issue was whether the mistrial was properly granted. The Court noted that an unalterable pretrial attitude on the part of the Court toward a witness is not grounds for a mistrial in all cases, but here the witness was necessary to the prosecution's case. As the witness was named in three of four specifications, bias towards him would prejudice the side presenting him and might destroy the fairness of the trial. The Court also felt that the court members' opinion of the witness could very well influence their deliberation as they did not plainly demonstrate that their preconceived opinions could yield to the evidence. Thus, the law officer was correct in granting the mistrial and the defense of former jeopardy was rejected.

Judge Ferguson dissented because he felt that there was no showing the members were hopelessly partisan, that there was no manifest necessity for granting a mistrial, and, finally, that the witness' testimony pertained to only three of the four specifications.

4. Physical Inability.

In *United States v. Cooley,*[80] the defendant was convicted of

[79] 15 U.S.C.M.A. 628, 36 C.M.R. 126 (1966).
[80] 16 U.S.C.M.A. 24, 36 C.M.R. 180 (1966).

sleeping on post and failure to obey a lawful order. The accused produced evidence at trial showing that he suffered from narcolepsy and often fell asleep at unlikely times and places. The president's instruction on the defense of physical inability centered around the reasonableness of the accused's failure to stay awake in light of all the facts and other relevant circumstances. The Court of Military Appeals felt this was an improper instruction because reasonableness never entered the case at all. Here the accused's condition, if believed, would completely prevent compliance with the order. Thus, instead of going into the concept of reasonableness, the president should have instructed that the accused would be excused from the offense if its commission was proximately caused by his physical condition. The board of review was reversed.

5. Accident.

The defense of accident was examined in ***United States v. Pemberton.***[81] The law officer had instructed that an assault is excused if it was the result of accident or misadventure. He further instructed that if the assault resulted from the fault of the accused, it was not accident. The Court of Military Appeals found prejudicial error in the phrase "resulted from the fault of the accused" inasmuch as this permitted the members to predicate guilt upon a "fault" of simple negligence. ***Torres-Diaz***[82] and other cases cited clearly showed that such a predicate of simple negligence was error.

6. Statute of Limitations.

In ***United States v. Wiedemann,***[83] the law officer instructed upon desertion but gave no instructions on the lesser included offense of absence without leave apparently because the statute of limitations had run on the latter. The majority held that the law officer was required sua sponte to instruct on the lesser offense even if it appears to be barred by the statute of limitation.

V. EVIDENCE

A. *SEARCHAND SEIZURE*

There was no probable cause for the search of the accused's belongings in ***United States v. Dollison.***[84] The accused's com-

[81] 16 U.S.C.M.A. **83,** 36 C.M.R. 239 (1966).
[82] United States v. Torres-Diaz, 15 U.S.C.M.A. 472, C.M.R. 444 (1965).
[83] 16 U.S.C.M.A. 365, 36 C.M.R. **521** (1966).
[84] 15 U.S.C.M.A. 595, 36 C.M.R. 93 (1966).

manding officer, in making an inquiry as to accused's marital status, phoned his old unit. During this conversation, he was asked to question the defendant about a tape recorder and light meter which were missing shortly after the accused left that unit. Based on the telephone conversation, the commanding officer authorized a search which yielded other stolen items. The Court held the search to have been based on mere suspicion. Therefore, the fruits of the search were inadmissible.

The question of probable cause was also present in ***United States v. Martinez.***[85] The facts as brought out at trial revealed that an airman sleeping in his barracks awoke to find the accused going through his clothing, the airman gave pursuit, and caught the accused about 200 yards from the barracks. Shortly thereafter, at the Military Police station, the noncommissioned officer in charge told accused's commanding officer that the incident followed the modus operandi of three other recent thefts in the same area and asked permission to search. He also told the commanding officer the items for which he was searching. The Court held that the commanding officer's authorization to search in this case was proper as probable cause present. The similarity in the method of operation of the crimes, combined with perpetration of similar offenses within the same area in a relatively short period of time, constituted enough evidence to support a conclusion that probable cause existed.

In ***United States v. Penman,***[86] agents informed the officer who later authorized a search that they had raided a party and found marihuana upon at least two persons present. The accused had departed the party **15** to **30** minutes prior to the raid and the agents suspected that he was in possession of marihuana. The majority found that the agents did not communicate sufficient evidence to justify the creation of probable cause in the mind of the authorizing officer. Because the search was improper, the fruit of that search could not be admitted into evidence.

The ***Carter*** case[87] involved a search of an off-post dwelling in France and the effect of the NATO SOFA agreement upon the search. The accused lived in a French owned building under a full occupancy guarantee by the United States Government. The United States agents, before initiating their search, called the French police who authorized the Americans to search the premises. Prior to this the appropriate French and American officials had agreed that the Americans could make such a search. The

[85] 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966).
[86] 16 U.S.C.M.A. 67, 30 C.M.R. 223 (1966).
[87] United States v. Carter. 16 U.S.C.M.A. 277, 36 C.M.R. 433 (1966).

Court of Military Appeals held that all these activities were proper and satisfied the SOFA Agreement.

A rather bizarre factual setting caused the Court of Military Appeals to find that there was no probable cause for the seizure in ***United States v. Thomas.***[88] The accused was assigned as a substitute Charge of Quarters runner one night. Early the next morning a soldier found the accused in a deep sleep with a bottle of white powder in his hand. The Charge of Quarters was informed he took the bottle from accused's hand without awaking him. The bottle later was found to contain heroin. It was determined that there was no probable cause for the seizure because there was no evidence that the Charge of Quarters had any reason to take the bottle out of the accused's hand. In addition, the Charge of Quarters could not be construed to be a "volunteer," thus rendering the seizure valid, because he was in the command chain over the accused and could exercise discipline over him.

An airman in ***United States v. Aloyian***[89] advised accused's commanding officer that the accused used marihuana. The commander had the airman buy some from the accused. After determining that the substance was indeed marihuana, the commanding officer asked the airman to buy some more. The airman proceeded to pay the accused for the marihuana and shortly thereafter the accused's roommate delivered the substance to him. Immediately, the commanding officer and several Office of Security Investigation agents raided the accused's barracks room and found marihuana allegedly belonging to the accused in the locker of the accused's roommate. The Court of Military Appeals reasoned that the main theme of ***Jones v. United States***[90] was not applicable here. That decision does not extend to those who by virtue of their wrongful presence cannot invoke the privacy of the premises searched. Thus, here accused cannot complain about the search, for the evidence showed that each man was assigned his own locker and the accused had neither expressed nor implied permission to store the marihuana in his roommate's locker. The roommate testified the marihuana was not his. As to the commanding officer's authorization to search that particular locker, the record showed the commanding officer was present during the search and that he controlled the propriety and limits of the search rather than the law enforcement officers.

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[88] 16 U.S.C.M.A. 306, 36 C.M.R. 462 (1966).

[89] 16 U.S.C.M.A. 333, 36 C.M.R. 489 (1966).

[90] 362 U.S. 257 (1960). The case stated the broad concept that anyone legitimately on the premises where a search occurs may challenge its legality when its fruits are proposed to be used against him.

B. *CONFESSIONS AND WARNING OF RIGHTS UNDER ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE*

1. *Pretrial Statements.*

In *United States v. Andrews,*[91] the testimony revealed that the accused had refused to submit to a blood alcohol test. The Court held that the receipt of such evidence was clearly error. The improper presentation of the direct or indirect reliance upon the right against self-incrimination involves the standard of specific prejudice rather than general prejudice. In the case at hand, the Court found the error to be nonprejudicial in the face of almost overwhelming evidence in support of the allegation.

The same error of submitting to the members evidence of the assertion of the right against self-incrimination arose in *United States v. Jones.*[92] A written pretrial statement was submitted to the triers of fact which contained a passage in which the accused asserted his right to remain silent. This was error and the Court tested for specific prejudice. Insofar as the specifications involved in the subject to which the accused elected to remain silent, the Court found specific prejudice and reversed.

In the *Wimberley* case[93] a dispute arose over the admissibility of a statement after a prior statement was declared violative of article 31 of the Code. It appears that the accused made the second statement four days after the first and inadmissible one. He was interviewed by a different agent, was advised of his rights under article 31, and had stated that this new statement was of his own volition. However, he was not told that the first statement could not be used against him. The Court of Military Appeals said that the test to be applied is an analysis of all the surrounding circumstances to determine if the taint of the first statement still existed. In this case, the Court found that the taint had ceased to exist when the second statement was made.

Accused was put on guard duty one evening to protect a helicopter in *United States v. Traweek.*[94] When the accused was relieved at 9:30 that night the helicopter was tipped over on its side and damaged. Four CID agents arrived at 10:30, escorted the accused to a motel, started questioning him around 1:00 in the morning, and elicited incriminating statements from him around 4:00 in the morning. At trial, accused claimed that at the time of the questioning he was *groggy* from drinking, the agents used high

[91] 16 U.S.C.M.A. 20, *36* C.M.R. 176 (1966).
[92] 16 U.S.C.M.A. 22, 36 C.M.R. 178 (1966).
[93] United States v. Wimberley, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).
[94] 16 U.S.C.M.A. 50, 34 C.M.R. 206 (1966).

powered tactics on him, told him they could use force, and would not let him see a lawyer. The agents testified that the accused had not been drinking, that he looked fine, that he did not want to see a lawyer, and that they did not use high powered tactics. In fact, they even offered him food and coffee. The Court of Military Appeals held all of this was a question of fact and the trier of the facts had already determined the matter. Thus, the confession was not inadmissible as a matter **of** law. The case was reversed, however, because the law officer failed to instruct the Court that the prosecution had the burden to prove beyond a reasonable doubt that accused was not deprived of counsel as he had insisted. The instructions as given left the possibility of the court thinking the defense counsel had to prove affirmatively that the accused was deprived of counsel.

2. *General.*

In ***United States*** u. ***Weeks,***[95] the only tangible evidence which the prosecution brought forward to prove accused had wrongfully sold government property was the testimony of a Sergeant Coons. Coons testified that accused approached him concerning the theft and sale of the weapons, that Coons himself stole the weapons and placed them in his car, that accused drove the car away and later returned without the weapons. He advanced two sums of money to Coons a few days later. The issues on appeal centered around whether, first, these facts constituted sufficient corpus delicti to allow accused's confession into evidence or, second, whether the confession was contemporaneous with the crime so that it could be admitted into evidence without corroboration.

The Court of Military Appeals found that no evidence of the recovery of the stolen items had been presented nor had a tracing of the items to any particular individual been presented. The assertion of a sale was, under these facts, mere speculation. A corpus delicti supporting the confession did not exist. The Court also found that there was no proof the confession was contemporaneous with the crime.

After a military informant provided the lead, the FBI apprehended the accused in ***United States*** u. ***D'Arco.***[96] During the apprehension, the agents gave the standard FBI warning which did not advise the accused of the nature of the offense of which he was suspected. The defense asserted that this omission prohibited the admission of the subsequent statement by the accused. The

[95] 15 U.S.C.M.A. 583, 36 C.M.R. 81 (1966).
[96] 16 U.S.C.M.A 213, 36 C.M.R. 369 (1966).

Court of Military Appeals disagreed. The Court noted that there was concurrent jurisdiction between the civilian and military authority in this area and that the FBI was acting independently of military authority at the time of the apprehension. Article 31 did not apply in this circumstance and there was no duty to warn.

C. HEARSAY

The president of the special court-martial called an out-of-court hearing in *United States v. Baca.*[97] During this "hearing", the president examined an investigative agency report which contained a statement that the accused had confessed to the offense charged. No evidence of such a confession was ever before the court. The Court of Military Appeals found prejudicial error in the presentation of such hearsay to one of the triers of fact.

United States v. Barnes[98] was a special court-martial case concerning two specifications of absence without leave. To rebut the testimony of the accused, the prosecution called a witness who testified that he had called another installation and had received a telephonic report from that unit which purported to show that the files of that unit did not contain entries supporting the assertions of the accused. The significance of the absence of the supporting entries as rebutting the accused's testimony was stressed by the trial counsel in his closing argument and by the staff judge advocate in his initial review. The Court of Military Appeals decided this was hearsay testimony and under the circumstances prejudicial since it was relied upon and stressed by the trial counsel and the staff judge advocate.

The problem of hearsay was also in issue in *United States v. Williams.*[99] A psychiatrist testified for the prosecution that his opinion that the accused was suffering from a character and behavior disorder was based in part on interviews with the accused. The defense counsel on cross-examination attempted to elicit what was said at the interviews but the law officer sustained a hearsay objection to the probe. The Court of Military Appeals reversed this case indicating that statements elicited to show a state of mind, rather than for their own truth or falsity, are not hearsay. The Court also cited paragraph 138*e* of the Manual to show that on cross-examination an expert witness may be required to specify the data upon which his opinion is based.

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[97] 16 U.S.C.M.A. 311, 36 C.M.R. 467 (1966).
[98] 15 U.S.C.M.A. 546, 36 C.M.R. 44 (1965).
[99] 16 U.S.C.M.A. 210, 36 C.M.R. 366 (1966).

D. *WITNESSES*

1. *Accomplice Testimony.*

In a case[100] in which the accused was charged with receiving stolen property, a prosecution witness testified that the accused suggested that the witness might reduce his indebtedness to him by stealing property and turning it over to the accused. After doing so, he told the accused the items were stolen when the goods were received by the accused. On appeal, it was alleged that the law officer should have instructed on the built-in unworthiness of his testimony because he was an accomplice of the accused. The Court of Military Appeals cited the general rule that a thief cannot be an accomplice of the receiver of stolen property. They went on to say that the exception to that rule is when a conspiracy or prior plans existed between the two. In this situation there was a unity of criminal acts in the taking and receiving. Thus, the Court held that the accomplice instruction was required and should have been given sua sponte.

2. *General.*

In *United States v. Strong,*[101] the question arose whether the defense counsel could interview a prosecution witness after the witness had taken the stand. The law officer ruled that once a witness was called to the stand the opposing counsel's right to question that witness was limited to formal cross-examination. Paragraphs 42*c* and 48*g* of the Manual were cited by the Court of Military Appeals as authority for the proposition that a witness is the property of neither side. Therefore, the law officer had ruled incorrectly on the matter. The error was not prejudicial, however, because there was no showing or attempted showing by the defense counsel that the error operated to deprive the accused of effective assistance of counsel. Judge Ferguson dissented and theorized that any infringement upon the right of accused and his counsel to interview witnesses denied the accused his right to counsel.

E. *FORMER TESTIMONY*

Can verbatim statements from an article 32 investigation be used in a later court-martial? This question was answered in the affirmative in *United States v. Burrow.*[102] At the accused's general

[100] United States v. Lell, 16 U.S.C.M.A. 161, 36 C.M.R. 317 (1966).
[101] 16 U.S.C.M.A. 43, 36 C.M.R. 199 (1966).
[102] 16 U.S.C.M.A. 94, 36 C.M.R. 250 (1966).

court-martial in France two incriminating statements from French nationals were offered. They were admitted over defense objections. The Court of Military Appeals held that the testimony was allowable when the statement came from a verbatim article 32 investigation where the defense counsel and the accused had the opportunity to cross-examine the witness. The unavailability of the witness was shown by proof that the witnesses were not subject to subpoena power and the trial counsel had in good faith attempted to get the witnesses there but could not.

F. OTHER ACTS OF MISCONDUCT

The prosecution established that the accused in United States *v. Donley*[103] had been punished under article 15 of the Code. In a "per curiam" opinion, the conviction was reversed because the limiting instruction of the law officer failed to advise the court members that they might not convict the accused because he was a "bad man" nor consider it as evidence in determining guilt or innocence of the offense charged.

The accused in United States *v. Turner*[104] was convicted of the wrongful possession and wrongful sale of marihuana. In order to foreclose any possibility of raising the issue of entrapment, the stipulation of fact presented to the court-martial after the accused's plea of guilty contained references to other uncharged sales of marihuana by the accused. The law officer gave no limiting instructions and, on appeal, the Government argued that such proof was admissible to rebut a claim of entrapment. The Court of Military Appeals dismissed this argument by noting that a sua sponte instruction limiting the use of the evidence would be required even if properly admitted into evidence for the purpose stated. The Court noted prejudice from the fact that the court-martial returned a maximum sentence in only eight minutes of deliberation on sentence.

VI. SENTENCE AND PUNISHMENT

A. INSTRUCTIONS RELATING TO THE SENTENCE

In his instruction on the sentence, the special court-martial president noted that the maximum punishment which could be imposed by the court included "forfeiture of two-thirds pay for six months."[105] The defense counsel made no objection to that

[103] 15 U.S.C.M.A. 530, 36 C.M.R. 28 (1965).
[104] 16 U.S.C.M.A. 80, 36 C.M.R. 236 (1966).
[105] United States v. Andrews, 15 U.S.C.M.A. 514, 36 C.M.R. 12 (1965).

instruction, and acknowledged the correctness of the figure $83.20 for accused's basic monthly pay, as stated on the charge sheet. The court-martial imposed a forfeiture of $55.00 pay per month for six months. The issue on appeal was whether the instructions were prejudicially erroneous. This issue was resolved against the accused. The rationale of the decision was as follows: Since the words used were "two-thirds pay for six months," this could logically be interpreted to mean two-thirds of the total pay earned in six months. Thus, authorized to sentence the accused to forfeit the sum of $332.00, it was not improper for the court to apportion that sum and by simple calculation determine a sentence to "forfeit $55.00 pay per month for *six* months."

After the special court-martial in ***United States v. Wanhainen***[106] adjudged a "bad conduct discharge, suspended for six months," the convening authority approved the sentence and suspended the discharge for six months. Earlier cases had held that the portion of the sentence of the court attempting to suspend the punitive discharge was a nullity. On appeal, the Court of Military Appeals noted that the president had erred when he failed to instruct the court-martial that the suspending portion of the sentence was a nullity. The Court noted that the accused had presented extensive extenuation and mitigation and, when examined against the sentence attempted by the court-martial, it was clear that a properly instructed court might not have imposed any punitive discharge. Therefore, the failure to instruct by the president was prejudicial error which was not purged by the action of the convening authority.

In ***United States v. Koleff,***[107] a general court-martial sentenced the accused to be confined at hard labor for one year and to be reduced to the grade of E-4. The law officer had not instructed, nor was he requested to, on the automatic reduction provisions of article 58*a* of the Code. When examined against the extensive extenuation and mitigation presented, the sentence attempted by the Court clearly showed that had the court been properly instructed it may not have adjudged a sentence of confinement at hard labor. Therefore, the failure to instruct was prejudicial error. The case was returned to The Judge Advocate General of the Army for action not inconsistent with the opinion. The Court specifically noted that a board reassessing the punishment must do so that, within the terms of article 58*a,* the accused will not be reduced below the grade of E-4.

"" 16 U.S.C.M.A. **143,** 36 C.M.R. 299 (1966).

[107] 16 U.S.C.M.A. 268, 36 C.M.R. 424 (1966). ***Accord*** United States **v.** Rankin, 16 U.S.C.M.A. 272, 36 C.M.R. 428 (1966).

Where a bad conduct discharge may be imposed only because of the existence of previous convictions, the Court of Military Appeals held, in a per curiam opinion, that it was prejudicial error not to so advise the court.[108]

B. *EFFECTIVE DATE OF FORFEITURES*

In United States *v.* Lock,[109] a general court-martial sentenced the defendant to a dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for five years. The convening authority approved the sentence but suspended the confinement and so much of the forfeitures which exceeded $150.00 per month for five years. In his action, the convening authority directed that the forfeitures apply to pay becoming due on and after the date of his action. Six months later, a succeeding convening authority, then having jurisdiction over the accused, vacated the suspended confinement but made no reference to the applicability of forfeitures. A board of review found that the application of the forfeitures of pay becoming due on and after the date of the initial action was illegal in view of the fact that a punitive discharge was approved but all confinement was suspended. Nevertheless, the board concluded that the only impediment to the application of the forfeitures was removed with the subsequent vacation of suspension of the confinement by the second convening authority. The board directed that the forfeitures should apply from the date of the subsequent vacation. The Court of Military Appeals cited the *White*[110] case in affirming the board of review. That case clearly showed that a sentence of an approved punitive discharge which does not also contain unsuspended confinement will not permit application of adjudged forfeitures to pay and allowances accruing on and after the date of the convening authority's action. Thus, the original convening authority in this case had erred.

C. *PRETRIAL AGREEMENTS*

After making a pretrial agreement, the accused in United States *v. Stovall*[111] pleaded guilty at the trial. The convening authority

[108]-United States v. Toney, 16 U.S.C.M.A. 296, 36 C.M.R. 462 (1966).
[109] 15 U.S.C.M.A. 574, 36 C.M.R. 72 (1965).
[110] United States v. White, 14 U.S.C.M.A. 646, 34 C.M.R. 426 (1964).
[111] 16 U.S.C.M.A. 291, 36 C.M.R. 447 (1966).

had agreed that any adjudged bad conduct discharge would be suspended for six months. The Court sentenced the accused to a bad conduct discharge, forfeiture of $62.00 per month for six months, and confinement at hard labor for six months. The convening authority approved the sentence and suspended the bad conduct discharge for the period of confinement plus six months. In a per curiam opinion, the Court of Military Appeals held this was a substantial variation from the pretrial understanding with the accused and was prejudicially erroneous.

The terms of a pretrial agreement were disputed in ***United States v. Monett.***[112] The accused's plea of guilty in that case was in exchange for the convening authority's promise not to approve any sentence in excess of a bad conduct discharge and confinement at hard labor for one year. The sentence imposed by the court was forfeiture of $50.00 per month for 18 months and reduction to **E-3.** The staff judge advocate recommended reducing the forfeitures to one year to be in agreement with the pretrial negotiation. The Court of Military Appeals looked to see if the approved sentence of forfeiture of $50.00 per month for one year and reduction to **E-3** would be "in excess of" or "more onerous than" a bad conduct discharge and one year's confinement at hard labor. The Court said it was not; therefore, the approved sentence was entirely in accord with the terms of the convening authority's agreement.

D. *PROCEDURE*

In ***United States v. Norwood,***[113] the accused was convicted by a special court-martial aboard ship. The record of trial revealed several errors in procedure. First, it could not be established that instructions requested in writing by the defense counsel had ever been given for they were not attached to the record. Second, the record showed that after the court closed the trial counsel informed the president the sentence was improper and the court reopened to announce a second sentence. The lack of any clear showing in the record that the defense counsel was aware of the discussion or had any opportunity to object or present other instructions was prejudicial error. The case was reversed.

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[112] 16 U.S.C.M.A. **179, 36** C.M.R. **335 (1966).**
[113] 16 U.S.C.M.A. 310, **36** C.M.R. **466** (1966).

VII. POST TRIAL REVIEW

A. *STAFF JUDGE ADVOCATE'S REVIEW*

The accused in ***United States v. Owens***[114] contended that the staff judge advocate forgot to include in this post trial review that the convening authority must be convinced beyond a reasonable doubt that the evidence establishes guilt and that the findings are correct in law and fact. The Court of Military Appeals said although a specific reminder to this effect is suggested, the review is still adequate; if read as a whole it leaves no doubt that the convening authority knows that he must be convinced beyond a reasonable doubt that the accused is guilty. Here the staff judge advocate mentioned twice in the review that in his opinion the evidence supported the findings of guilt beyond a reasonable doubt. Thus, there was no fair chance that the convening authority was misled into applying the improper standard of review.

In the Metz case,[115] the Court of Military Appeals reversed a board of review and found that the accused had not received an impartial review of his case. Although the staff judge advocate appeared to be the sole author of the post trial review in the case, the trial counsel had conducted the post trial interview and had prepared a rough draft of the post trial review, up to the section dealing with rehabilitation and the convening authority's recommendation. The Court stated that the trial counsel is not impartial and in this instance his actions amounted to more than a ministerial act. It was held, however, that the inconsistent review did not affect the findings of the court as to guilt because the accused had pleaded guilty.

B. *ACTION OF CONVENING AUTHORITY*

A special court-martial in ***United States v.*** *Carpenter*[116] convicted the accused on 4 February 1965. Prior to the sentencing portion of the trial, the trial counsel, without objection from the defense counsel, introduced records of two previous convictions by special courts-martial, one in 1961 for drunk driving and one in 1963. The convening authority, in reviewing the proceedings, determined the 1961 conviction was erroneously admitted and ordered proceedings in revision by the same court-martial with directions to reassess the sentence and to disregard the 1961 offense. On appeal the defense counsel urged that the rehearing

[114] 15 U.S.C.M.A. 591, 36 C.M.R. 89 (1966).
[115] United States v. Metz, 16 U.S.C.M.A. 140, 36 C.M.R. 296 (1966).
[116] 15 U.S.C.M.A. 526, 36 C.M.R. 24 (1965).

could only have been accomplished before another tribunal. The Court of Military Appeals pointed out that revision proceedings are appropriate in this type situation and may be performed before the same court if there is no material risk of prejudice to the accused. Here the offense occurred three years previously, it was a minor offense, the accused had since received an honorable discharge and been allowed to reenlist, and the offense was unrelated to the offense for which he was now being tried. As a result, there was no fair risk that the court would not disregard the old conviction and the fact that they adhered to the same sentence does not necessarily mean they did not disregard it.

United States *v. Prince*[117] declared invalid section 0120*a* of The Judge Advocate General of the Navy's Manual which purported to require convening authorities to state their reasons for suspend- suspending a punitive discharge in special court-martial cases involving convictions of larceny or other offenses involving moral turpitude. The Court of Military Appeals reasoned that the convening authority has absolute discretion is disapproving findings and sentences. He may disapprove a finding or sentence for any reason and to require him to state his reason therefore infringes upon his discretion.

C. *APPELLATE* REVIEW BY BOARDS OF REVIEW AND THE COURT OF MILITARY APPEALS

The accused in United States *v. Entner*[118] was convicted by a general court-martial for absence without leave and sentenced to a bad conduct discharge, total forfeitures, and reduction to the lowest enlisted grade. The sentence was approved by the convening authority and the case sent to a board of review. While pending before the board, the convening authority remitted all of the accused's sentence except for the reduction and on the same day the accused was administratively discharged from the service under the provisions of AR 635-208. Appellate defense counsel contended to the Court of Military Appeals that the court-martial proceedings were terminated upon the accused's administrative discharge. The Court replied in the negative asserting that once jurisdiction attaches it continues until the appellate proceedings are completed.

In the Wimberley case,[119] the appellate defense counsel alleged that because the board of review received new evidence on the

[117] 16 U.S.C.M.A. 314, 36 C.M.R. 470 (1966).
[118] 15 U.S.C.M.A. 564, 36 C.M.R. 62 (1965).
[119] United States v. Wimberley, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966)

issue of accused's mental responsibility, it was bound to direct a rehearing. This contention was not considered meritorious because the board may consider the weight and effect of the new matter to determine if a rehearing is necessary. If the board feels that there is still no tangible issue after the new evidence has been introduced they do not have to require a rehearing.

The Judge Advocate General certified the question whether a board of review was correct in setting aside the accused's sentence in the ***Monett*** **case.**[120] **The** accused moved to dismiss the certificate contending that article 69 of the Code denied him equal protection of the law. He declared that article 69 permitted the Government the right to appeal but denied it to him. The Court of Military Appeals rejected the accused's contention. They pointed out that there is a valid distinction between the purposes of The Judge Advocate General and the accused in appealing. The purpose of The Judge Advocate General in appealing certain cases is to provide for uniformity in interpreting the ***Uniform Code of Military Justice.*** This is a legitimate objective and justifies Congress enabling The Judge Advocate General to certify certain cases.

In ***United States v. Moore,***[121] the board of review dismissed the charges against the accused, finding that he was not mentally responsible at the time of the offense. The issue on certification was whether the board was correct in dismissing the charges rather than directing a rehearing. The Court of Military Appeals noted that the board had based its findings partly on post trial psychiatric examinations which were not statements of facts but only opinion. The Court felt that society and the Government are entitled to a chance to rebut this testimony by proper cross-examination. The board was reversed and the record returned with leave to order a rehearing.

D. *REHEARING*

In ***United States v. Smith,***[122] the accused's initial conviction by court-martial had been reversed by the Court of Military Appeals. A rehearing had been authorized. Now, the issue was whether the succeeding convening authority where the accused was now assigned could authorize a rehearing after the original convening authority, under whom the accused was tried, decided it was impractical. The Court of Military Appeals looked to paragraph **84** of AFM 110-8 for the solution. They decided the language in

[120] United States v. Monett, 16 U.S.C.M.A. 179, **36** C.M.R. 335 (1966)
[121] 16 U.S.C.M.A. **332,** 36 C.M.R. **488** (1966).
[122] 16 U.S.C.M.A. **274, 36** C.M.R. **430** (1966).

that paragraph vested the authority to decide whether a rehearing should be ordered in the original convening authority. Thus, here, where the succeeding convening authority had discarded the original convening authority's advice and went ahead and tried the accused, the charge must be dismissed as the rehearing was unauthorizad.

By Order of the Secretary of the Army:

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